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82-1264

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF LOUISIANA,

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE D.C. CIRCUIT

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January 28, 1983

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QUESTIONS PRESENTED

"Curtailment" of natural gas customers occurs when a gas pipeline has inadequate supplies to meet the contract requirements of all of its customers. The pipeline then allocates its supply among its customers according to a "curtailment plan" contained in a tariff on file with the Federal Energy Regulatory Commission.

Section 401 of the Natural Gas Policy Act of 1978 (NGPA) requires that the curtailment tariffs of interstate pipeline companies be amended to protect deliveries to "essential agricultural users" and to "high priority users." The Federal Energy Regulatory Commission (FERC) has issued detailed rules purporting to implement that requirement. The rules also require interstate pipeline companies to use a specific method for allocating gas between (a) customers which have more than one supplier, and (b) customers which depend fully on the curtailing pipeline. That allocation methodology will, when applied to some pipelines, cause the elimination of deliveries to higher priority customers in some regions in order to increase deliveries to lower priority customers in other regions. The FERC rule allows pipelines to file tariffs under Section 4 of the Natural Gas Act which contain differing allocation mechanisms more appropriate to their systems, but the FERC will not allow the implementation of those tariff provisions unless special permission is first sought and obtained from the agency. There is no limit on the period of time the agency may take in acting on a request for such special permission.

The questions presented are:

1. Did the Court of Appeals err in holding that the FERC has general rulemaking powers which allow it to suspend the effectiveness of filed tariffs for an indefinite

period beyond the five month maximum suspension period allowed by the Natural Gas Act?

2. Do the provisions of the NGPA supersede the requirements of Section 4(b) of the Natural Gas Act that curtailment be administered and implemented in a nondiscriminatory manner?

3. Does the requirement of the NGPA that the FERC implement new curtailment priorities override the procedural requirements of the Natural Gas Act for modifying and changing filed curtailment tariffs?

PARTIES TO THE PROCEEDING

The decision below was issued in consolidated appeals from the rulings of three agencies, the Federal Energy Regulatory Commission, the U.S. Department of Agriculture, and the United States Department of Energy. Numerous issues were raised in the consolidated appeals, and there were numerous petitioners and intervenors in the consolidated proceedings. The specific issues presented by this petition were raised in three appeals:

State of Louisiana v. *Federal Energy Regulatory Commission* (No. 79-2297)

State of Louisiana v. *Federal Energy Regulatory Commission* (No. 79-1569)

United Gas Pipe Line Company v. *Federal Energy Regulatory Commission* (No. 79-1813)

A complete list follows of the parties to the consolidated proceedings:

Air Products and Chemicals, Inc.
Alabama Gas Corp.
Allied Chemical Corp.
The American Bakers Ass'n
American Gas Ass'n
American Industrial Clay Co. of Sandersville and Georgia Kaolin Co.
American Meat Institute
American Paper Institute, Inc.
American Seed Trade Ass'n, Inc.
American Sugar Cane League of the USA, Inc.
The American Textile Manufacturers Institute, Inc.
Armour & Company
Atlanta Gas Light Company
Biscuit and Cracker Manufacturing Ass'n
Brooklyn Union Gas Company
Columbia Gas Transmission Corp.
Columbia Nitrogen Corp., and Nipro, Inc.
Consolidated Edison Company of New York

Consolidated Gas Supply Corp.
Corn Refiners Ass'n
DISCUS
The Distilled Spirits Council of the
United States, Inc.
East Tennessee Natural Gas Co.
Eli Lilly and Company
Entex, Inc.
Farmland Industries, Inc.
The Fertilizer Institute
First Mississippi Corp.
Glass Packaging Institute
The Great Western Sugar Co.
High Plains Gas Consumer Group
Kansas-Nebraska Natural Gas Co.
Midwestern Gas Transmission Co.
Mississippi River Transmission Corp.
National Council of Farmers Cooperatives
National Food Processors Association
National Independent Meat Packers Ass'n
National Soybean Processors Ass'n
New Jersey Natural Gas Co.
North Carolina Natural Gas Corp.
Northern Natural Gas Co.
Pacific Gas & Electric Co.
Public Service Commission of the State of New York
Public Service Company of North Carolina, Inc.
Public Service Electric and Gas Co.
The Retail Bakers of America
Riceland Foods
Southern California Gas Co.
Southern Natural Gas Co.
State of Louisiana
State of Oklahoma
State of Texas
Stauffer Chemical Co.
Tennessee Gas Pipeline Co.
Tera Chemicals International, Inc.
Texas Gas Transmission Co.
Transcontinental Gas Pipe Line Corp.
United Distribution Companies

The United States Brewers Association
United States Department of Agriculture
United States Department of Energy
Washington Gas Light Co.
West Texas Gas, Inc.
Willamette Industries, Inc.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE D.C. CIRCUIT

The State of Louisiana respectfully prays that a writ of certiorari issue to review the judgment and opinion of the D.C. Circuit issued *en banc* in this proceeding on October 1, 1982. In the *en banc* opinion, the D.C. Circuit adopted, as the opinion of the *en banc* court, Part I.C of the Panel's opinion issued July 29, 1981.

Louisiana requests this Court to review only the narrow legal issues decided in Part I.C. of the Panel's opinion (A. 28-35),[1] which was adopted as the opinion of the *en banc* court (A. 116 n. 3).

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[1] Citations to the Appendix (A. ____) are to a separate appendix filed jointly by Louisiana and United Gas Pipe Line Company, which is also petitioning for review of the same portions of the court's opinions.

OPINIONS BELOW

The opinion of the panel of the D.C. Circuit (*Process Gas Consumers Group, et al.* v. *U.S. Department of Agriculture, et al.* (Nos. 79-1336, *et al.*)) was reported in advance sheets at 661 F.2d 1332 but was withdrawn by the court after rehearing *en banc* was granted. The Panel's opinion therefore does not appear in the bound permanent edition of the Federal Reporter.

The *en banc* decision of the court is not yet reported.

The full text of the panel opinion and the *en banc* opinion are set out in the separate appendix.

JURISDICTION

The judgment of the United States Court of Appeals for the D.C. Circuit on rehearing *en banc* was issued October 1, 1982. By order issued December 21, 1982, the Honorable Warren E. Burger, Chief Justice of the United States, extended Louisiana's time for filing its petition for a writ of certiorari to and including January 29, 1983. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES, REGULATIONS, AND RULINGS INVOLVED

The opinion of the court below ruled on issues raised in twenty-three consolidated appeals from rules of the United States Department of Agriculture, the Department of Energy, and the Federal Energy Regulatory Commission. The orders of the three agencies were issued to implement Section 401 of the Natural Gas Policy Act of 1978, 15 U.S.C. § 3391. This petition involves only certain portions of Order Nos. 29 and 29-C, issued by the Federal Energy Regulatory Commission on May 2, 1979 and October 22, 1979. The portions of those orders challenged by Louisiana were affirmed in Part I.C. of the panel's opinion (A. 28-35). Louisiana and United Gas Pipe

Line Company sought rehearing *en banc* of that part of the panel's opinion. The court *en banc* granted rehearing, and, in its opinion on rehearing, adopted Part I.C. of the panel's opinion as the opinion of the *en banc* court (A. 116 n. 3). The agency orders and the opinions of the court are set out in the separately filed Joint Appendix of the State of Louisiana and United Gas Pipe Line Company.

This petition raises issues about the powers of the FERC under Title IV of the Natural Gas Policy Act, 15 U.S.C. §§ 3391 *et seq*, and the relationship of its powers under Title IV to the procedural and substantive requirements of Sections 4, 5, and 16 of the Natural Gas Act, 15 U.S.C. §§ 717c, d, o. The relevant statutory provisions are set out in full in the appendix attached to this petition.

STATEMENT OF THE CASE

This petition requests this Court to review a portion of a decision of the U.S. Court of Appeals for the D.C. Circuit, sitting *en banc*, which affirmed a rule of the Federal Energy Regulatory Commission (FERC). That rule was issued to implement the statutory requirement of section 401 of the Natural Gas Policy Act of 1978, 15 U.S.C. § 3391, to provide a high priority for the delivery of gas for agricultural purposes during times of gas shortage.

The rule which the FERC issued implemented the new priority system, but it also imposed, without explanation, a requirement that interstate pipelines amend their tariffs to provide for a specified method of allocating gas between (1) customers which have multiple sources of supply and (2) those which are fully dependent on the pipeline. As shown by uncontroverted testimony and evidence before the agency, that allocation requirement will result in the reduction of deliveries to higher priority

customers in some regions of the country in order to supply additional deliveries to lower priority customers in other regions.

The FERC's rule will allow pipelines to propose tariffs with allocation methodologies more appropriate to their systems, but they are required to obtain special permission from the FERC before they may implement those proposed tariffs.

This appeal raises the issue, central to the administration of the Natural Gas Act and at least six other regulatory statutes, whether the FERC may, by fiat and without explanation, bar the implementation of new tariffs filed under Section 4 of the Natural Gas Act, 15 U.S.C. § 717c, until special permission is granted by the FERC to implement them. This appeal also raises the issue of the relationship of the new priorities established by Title IV of the NGPA and the requirement of the Natural Gas Act that natural gas allocation be implemented in a nondiscriminatory fashion.

Responsibility for administering the requirements of Section 401 was divided among three agencies. First, the Secretary of Agriculture was to identify and certify the natural gas requirements for "essential agricultural use." NGPA § 401(c), 15 U.S.C. § 3391(c). Second, the Secretary of Energy was directed to issue a rule providing that "to the maximum extent practicable," the provisions of a pipeline's tariff "may not provide for curtailment [reduction] of deliveries for any essential agricultural use" unless curtailment of such use is necessary to meet the requirements of, *inter alia*, high-priority users.[2] Section

[2] High-priority users are defined to include, *inter alia*, residences, commercial users, schools, and hospitals. Section 401(f).

401(a). Finally, the Federal Energy Regulatory Commission (FERC) was directed to "implement" the rule prescribed by the Secretary of Energy "pursuant to [the FERC's] authority under the Department of Energy Organization Act[3] to establish, review and enforce curtailments under the Natural Gas Act." NGPA § 403(b).

Numerous parties appealed various portions of the orders issued by the three agencies to the U.S. Court of Appeals for the D.C. Circuit. Louisiana challenged only certain portions of the orders issued by the FERC, and jurisdiction was established by Louisiana in the D.C. Circuit under Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b) and under Section 506 of the NGPA, 15 U.S.C. § 3416.

The questions presented to the court below by Louisiana were (a) whether the Federal Energy Regulatory Commission, in implementing the Secretary's rule, had exceeded its power "under the Natural Gas Act" to "establish, review, and enforce curtailments" by imposing a special permission requirement on the implementation of new tariffs when that requirement is inconsistent with the maximum suspension period permitted by Section 4 of the Natural Gas Act, 15 U.S.C. § 717c, and (b) whether the Federal Energy Regulatory Commission was correct that the mandate of the NGPA to establish new protection for essential agricultural users relieved it of the requirement of the Natural Gas Act, as interpreted by the courts, to administer curtailment according to the substantive standard of Section 4(b) of the

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[3] The Department of Energy Organization Act, 42 U.S.C. § 7101 *et seq*, transferred to the FERC much of the authority over natural gas curtailments which had previously been exercised by the Federal Power Commission. 42 U.S.C. § 7172(E).

Natural Gas Act, which prohibits pipelines from granting any "undue advantage or preference" to any customer.

A. The Statutory Scheme Under The Natural Gas Act For Establishing, Enforcing, And Reviewing Curtailments

The manner in which a pipeline will allocate gas among its customers in a time of shortage is set out in the provisions of the tariff which the pipeline has on file with the Federal Energy Regulatory Commission. Those provisions are commonly known as the pipeline's "curtailment plan."

The NGPA establishes certain new curtailment priorities and requires that the FERC administer those priorities pursuant to its authority "under the Natural Gas Act." NGPA § 403(b), 15 U.S.C. § 3393(b).

The FERC's authority "under the Natural Gas Act" to implement and administer curtailment was defined by this Court in *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621, 642 (1972). The Court held that the legal standard by which curtailment programs are judged under the Natural Gas Act is that of section 4(b) of the Natural Gas Act, 15 U.S.C. § 717c(b). That section prohibits pipeline companies from (l) "mak[ing] or grant[ing] any undue preference or advantage to any person . . . or (2) maintain[ing] any unreasonable difference in . . . service . . . as between classes of service." Procedurally, the Court found, the Natural Gas Act provides two mechanisms for administering and reviewing curtailments. The Commission may proceed under section 5 of the Natural Gas Act, 15 U.S.C. § 717d, to impose a change in a curtailment tariff already in effect. Alternatively, section 4 of the Act, 15 U.S.C. § 717c, allows the pipelines themselves to file proposed new tariffs, subject to Commission suspension, review, and modification.

Under section 4, a curtailment tariff filed by a pipeline will:

> go into effect in 30 days unless suspended by the Commission. If a filing is challenged or the [Commission] of its own motion deems it appropriate, it may suspend the amended tariff *for up to five months*, at the end of which time the amended tariff becomes effective pending completion of hearings.

FPC v. *Louisiana Power & Light Co.*, *supra*, 406 U.S. 621, 645 (1972) (emphasis added). In its opening brief to the Court of Appeals below, the FERC explained how it had used the section 4 procedures to administer curtailments:

> Beginning in the early 1970's, inadequate supplies of natural gas forced many interstate pipelines to reduce, or "curtail," deliveries of contracted or certificated volumes of natural gas to their customers. To cope with these shortages, the Federal Power Commission (predecessor to the Federal Energy Regulatory Commission) required every interstate pipeline to report whether the gas shortages would require curtailment (reduction) of its deliveries to its customers. Those pipelines anticipating a need to curtail deliveries were required to file revised tariffs to control deliveries to all customers pursuant to section 4 of the Natural Gas Act (15 U.S.C. § 717c). These tariffs, which are commonly known as curtailment plans, provide a mechanism for apportioning a shortfall among various customers when a pipeline's available natural gas supplies are inadequate to meet its contractual requirements.[4]

Parallel provisions to section 4 of the Natural Gas Act are found in at least six other regulatory statutes which

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[4] Brief for Respondent Federal Energy Regulatory Commission at 6-7 (footnotes omitted).

confer the power on an agency to regulate the rates and services of an industry. Each of those regulatory statutes, like the Natural Gas Act, permits the regulated entity to file proposed new tariffs setting forth changes in its rates or conditions of service. Each statute, in parallel provisions to section 4, allows the agency to suspend the tariff for a maximum period of time which is specifically set forth in the statute. If the agency review is not completed by the end of the suspension period, the tariff may be placed into effect, while agency review is completed. Such parallel provisions are found in (l) Interstate Commerce Act (rail rates), 49 U.S.C. § 10707 (maximum five month suspension), (2) Interstate Commerce Act (non-rail carriers), 49 U.S.C. § 10708 (maximum seven month suspension), (3) Federal Power Act, 16 U.S.C. § 824(e) (maximum five month suspension), (4) Communications Act, 47 U.S.C. § 204(a) (maximum five month suspension), (5) Shipping Act, 46 U.S.C. § 817(c)(4) (maximum 180 day suspension), (6) Postal Reorganization Act of 1970, 39 U.S.C. §§ 3624, 3641 (maximum ten month suspension).

B. The Two Elements Of The Curtailment Tariffs Filed And Implemented Under The Natural Gas Act—An Order Of Priorities And An Allocation Mechanism.

In its brief to the *en banc* court below, the Commission also explained in general terms the nature of the curtailment programs filed under the Natural Gas Act:

> In the early 1970's, the Commission began administering curtailment plans filed as tariffs by natural gas pipelines under section 4 of the Natural Gas Act, 15 U.S.C. § 717c. . . . Generally speaking, these curtailment plans have two basic elements: (l) a scheme of priorities based on the "end" use of the gas and (2) a method of allocating the gas among the pipeline's customers. *State of North Carolina* v.

> *FERC*, 548 F.2d 1003, 1007 (D.C. Circuit 1978). These curtailment plans were approved by the Commission on an adjudicatory (pipeline-by-pipeline) basis.[5]

Generally, "scheme of priorities" in the plans were arranged according to the "end use" of the gas. An "end use" curtailment plan ranks "various uses of natural gas . . . according to their essentiality or desirability, and allocation is first made to the highest priority use, then if supplies are sufficient, to the next highest use, and so on down the line until supplies are exhausted." *North Carolina* v. *FERC*, 584 F.2d 1003, 1007 (D.C. Cir. 1978). The object of an end use plan is "to ensure that higher priority uses are completely supplied before lower priority uses are served." *North Carolina* v. *FERC*, 584 F.2d at 1007.

The two elements of an end use plan—the order of priorities and the method of allocation—were identified by the D.C. Circuit in *North Carolina*.

> It is clear that a successful "end use" plan must have two elements: first, a priority ranking of particular end uses from highest to lowest and, second, an allocation mechanism for assuring that higher-priority uses are protected from curtailment ahead of lower priority uses. The first of these elements is relatively easy to devise. It is only necessary to classify the various uses of natural gas and then to rank these uses in order of priority. *The second element of an "end use" plan—the allocation mechanism designed to ensure high priority use ahead of low priority use—is somewhat more difficult.*

North Carolina v. *FERC*, 584 F.2d at 1007 (emphasis supplied).

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[5] Brief for Respondent Federal Energy Regulatory Commission on Petition for Rehearing En Banc of Section 1-C of the Court's July 29, 1981 Opinion, filed March 16, 1982 at 3.

The allocation mechanism, as the court in *North Carolina* found, is the heart of a curtailment plan. It is of the highest importance when a pipeline serves some customers which are fully dependent on the pipeline and other customers which have multiple sources of supply. If the allocation mechanism is faulty, the order of priorities will not be served as intended. The panel opinion below in this case recognized that an inappropriate allocation mechanism could easily result in the curtailment of high priority customers for the benefit of lower priority customers (A.30 n.15).

C. The End Use Requirements Established By Congress In The NGPA.

The Congress, in section 401 of the NGPA, established by statute two categories of higher priority uses which must be "completely supplied before lower priority uses are served." The Congress did not, however, attempt to specify any particular allocation mechanism to be used to ensure that the high priority end uses it identified actually would be protected on the systems of particular pipelines.

As directed by the statute, the Secretary of Energy prescribed a rule which, like the statute, addressed only the "first element" of the end use program required by Congress. The Secretary ordered interstate pipelines to realign their priority rankings of end uses to comply with the priority ranking specified by the NGPA. The Secretary's rule, like the statute, did not attempt to impose any particular allocation mechanism on the pipelines. 10 C.F.R. Part 580, 44 Fed. Reg. 15642 (March 15, 1979).

D. The Actions Of The FERC To Implement The Secretary's Rule

The FERC issued Order Nos. 29 and 29-C to implement the Secretary's rule. As required by the Secretary's

rule and section 401, the FERC orders directed the interstate pipelines to file new curtailment plans containing the new order of end use priorities established by the NGPA. The FERC went further, however. It also ordered the pipelines to provide in their tariffs for the use of a specified allocation mechanism for dividing gas between customers which are wholly dependent on the curtailing pipeline and those which are only partially dependent. The panel of the Court of Appeals (A. 28) correctly described the working of the Order No. 29 allocation mechanism:[6]

> The rule provides that each pipeline is responsible for supplying a proportion of the customer's high priority gas needs equal to the pipeline's percentage contribution to the customer's total needs during the base period.

In the administrative proceedings before the agency, Louisiana had submitted specific evidence to show that the allocation mechanism prescribed by Order No. 29 would, under foreseeable supply conditions, cause Louisiana's pipeline supplier to curtail high priority and essential agricultural users in Louisiana in order to supply gas to lower priority users in other parts of the country. That evidence was not disputed by the FERC. The FERC, in fact, provided no discussion of the impact of the mechanism it prescribed or of the rationale for requiring it. The Order No. 29 allocation mechanism was imposed by fiat, without discussion, without evidentiary findings,

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[6] The allocation mechanism prescribed by Order No. 29 is defined by the combined operation of §§ 281.204, 281.205(b), 281.208, and 281.209 (A.210-31). A technical change was made to § 281.209 in Order No. 29-C, but the change made by Order No. 29-C did not alter the workings of the allocation mechanism as correctly described by the panel of the Court of Appeals.

and without any findings that it was necessary or even appropriate to achieve the purposes of section 401.[7]

The FERC did state that it would, in specific cases, grant "adjustments" to the allocation mechanism required by the rule and that it would consider requests for such adjustments in proceedings held under section 502(c) of the NGPA, 15 U.S.C. § 3412(c). That section allows the agency to grant adjustments to any rules issued under the NGPA "as may be necessary to prevent special hardship, inequity, or an unfair distribution of burdens."

On rehearing before the agency, Louisiana objected that the rule was unlawful in that it purported to bar pipelines from filing, under section 4 of the Natural Gas Act, tariff provisions setting out alternate allocation mechanisms if those provisions would better serve the purposes of the NGPA under the particular circumstances affecting their systems. In response, the Commission stated that it would permit the filing of such tariffs but that it would bar their implementation for an indefinite period of time unless and until the Commission had granted special permission (an "adjustment") for the filings to be implemented. Order No. 29-C thus states that:

> Order No. 29 is a rule and it requires 37 named interstate pipelines to implement § 401 in a particular and detailed manner. Interstate pipelines may file plans under section 4 of the Natural Gas Act that deviate from Order No. 29. But such a filing by itself

[7] The opinion of the Court of Appeals does not discuss or describe the rationale of the agency for imposing the allocation mechanism selected. The court could not have done so because the agency did not provide a rationale.

> would not waive the requirement to file in accordance with Order No. 29 *unless* the pipeline has received an adjustment under § 502(c). *A deviant plan filed under section 4 of the NGA cannot go into effect until the requirements of Order No. 29 have been waived.* [Emphasis supplied][8]

E. Proceedings In The Court Of Appeals

On appeal to the D.C. Circuit, Louisiana and other parties[9] argued that, in acting by fiat to block the implementation of filed tariffs for a period which could easily be longer than the maximum five-month period permitted by statute, the FERC had asserted powers denied it by the Natural Gas Act. Those parties also objected that the allocation mechanism required by the FERC would cause unlawful discrimination under section 4(b) of the Natural Gas Act when applied to some pipelines. Finally, those parties objected to the FERC's abandonment of the nondiscrimination standard of section 4(b) and the substitution instead of the new and less specific "special hardship, inequity, or unfair distribution of burdens" standard of section 502(c) of the NGPA.

The panel of the D.C. Circuit, in part I.C. of its Opinion (A.28-35), found the Commission itself to be aware that the allocation mechanism required by Order No. 29 "might not be the most appropriate rule in all circumstances" (A.32). But the panel expressed confidence that the Commission, when enforcing the rule "in a particular situation" will be sensitive to the needs and requirements of particular pipelines (A.33-34). The panel upheld the "facial validity" (A.30) of the rule because it found that

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[8] A.292

[9] Including United Gas Pipe Line Company, Entex, Inc., Air Products and Chemicals, Inc., Stauffer Chemical Company, and Willamette Industries, Inc.

the Commission had provided adequate procedures for "adjustments" to the rule.

In response to the argument that the Commission's rule was inconsistent with the five month suspension period provided for by section 4 of the Natural Gas Act, the panel stated that the Commission was "free to announce constraints on tariff filings in the form of rules." For that proposition, the only statutory authority cited by the court was the Commission's general rulemaking power under section 16 of the Natural Gas Act, 15 U.S.C. § 717o and under the Department of Energy Organization Act, section 402(h),42 U.S.C. § 7172(h).

On rehearing *en banc*, the full D.C. Circuit announced that it had "decided to adopt Part I.C of the panel opinion as the opinion of the *en banc* court" (A. 116 n.3). The *en banc* court thus reaffirmed as its own the conclusion of the panel that the Commission's general rulemaking powers under the Natural Gas Act and the Department of Energy Organization Act permit it to delay indefinitely, while an adjustment request is pending, the implementation of a filed tariff. The *en banc* court then went on to say that:

> Thus, we adopt the panel's view that the Commisson's specific grants of authority under sections 401, 402, 501, and 502 of the NGPA control over the general requirements of sections 4 and 5 of the Natural Gas Act, 15 U.S.C. sections 717c, d. In doing so, we accept the Commission's position that section 502(c) of the NGPA, 15 U.S.C. § 3412(c) is an appropriate mechanism for correcting any inequities in specific plans that follow from application of its generic rule. . . . Absent a ripe case or controversy regarding the application of section 502(c), however, we will refrain from expressing an opinion as to whether our decision in *North Carolina* v. *FERC*, 584 F.2d 1003, 1012 (D.C. Cir. 1978), delineates the

scope of the Commission's authority in a section 502(c) proceeding.

REASONS FOR ALLOWING THE WRIT

Review by this Court of the *en banc* decision of the D.C. Circuit is necessary for two reasons:

1. The D.C. Circuit, *en banc*, has affirmed a rule of a regulatory agency which will suspend, without explanation, the implementation of filed tariffs for a period beyond the statutory suspension period set by law. In so doing, the *en banc* D.C. Circuit has thrown a previously settled body of regulatory law into disarray. The D.C. Circuit's decision conflicts directly with prior holdings of the Second Circuit and of the D.C. Circuit itself. The decision is also inconsistent with the reasoning of prior opinions of this Court.

2. In deciding that "specific" grants of authority under the NGPA control over "general" requirements of the Natural Gas Act, the *en banc* D.C. Circuit has found a conflict between the requirements of two important statutes where no conflict need exist. The D.C. Circuit's *en banc* decision thus raises fundamental questions about the relationship of the two principal statutes governing the natural gas industry. The answers to those questions will govern the pattern of deliveries to millions of gas consumers across the nation, and they should be addressed by this Court.

A. The En Banc Ruling Of The D.C. Circuit That The FERC May Use Its General Rulemaking Powers To Extend Indefinitely The Five Month Suspension Period Established By Section 4 Of The Natural Gas Act Conflicts Directly With An Opinion Of The Second Circuit And With Prior Decisions Of The D.C. Circuit, And It Is Inconsistent In Reasoning With Prior Opinions Of This Court On An Important Issue Of Law Affecting The Administration Of At Least Seven Regulatory Statutes.

The Natural Gas Act, like at least six other regulatory statutes,[10] provides that a regulated entity may initiate changes in its tariff by providing notice of the proposed change to the Commission. Under section 4 of the Natural Gas Act, the filed tariff will go into effect in 30 days unless it is suspended by the Commission. The Commission may suspend the tariff change for a period of up to five months while it reviews the proposed change. At the end of the five-month suspension period, the amended tariff becomes effective pending completion of hearings and administrative proceedings. *See FPC* v. *Louisiana Power & Light Co.*, *supra*, 406 U.S. 621, 645 (1972). Parallel provisions are found in the other six statutes. Until the decision of the D.C. Circuit in this case, every court which has considered the issue—whether under the National Gas Act or under the other statutes—has found that an agency is without power to suspend or delay the implementation of a filed tariff for a period longer than the maximum suspension period set by law unless the agency has, by the end of that period, completed proceedings and made necessary findings that the filed tariff is unduly discriminatory, or otherwise unlawful.[11] *See e.g.*, *United*

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[10] Listed *supra* at 8.

[11] An exception to that principle, not relevant here, occurs when the Commission has conducted proceedings under section 5 of the Act to prescribe a rate or practice, based on "substantial evidence in the

States v. *Scrap*, 412 U.S. 669, 697 (1973) (Interstate Commerce Act), *Arrow Transportation Co.* v. *Southern Railway Co.*, 372 U.S. 658, 661-67 (1963) (Interstate Commerce Act), *Willmut Gas and Oil Company* v. *FPC*, 294 F.2d 245, 248-49 (D.C. Circuit 1961), *cert. denied* 368 U.S. 975 (1962), *American Telephone & Telegraph Co.* v. *FCC*, 487 F.2d 865 (2nd Cir. 1973), *MCI Telecommunications Corp.* v. *FCC*, 561 F.2d 365, 375 (D.C. Cir. 1977), *cert. denied* 434 U.S. 1040 (1978) (Communications Act), *Indiana and Michigan Electric Co.* v. *FPC*, 502 F.2d 336 (D.C. Cir. 1974), *cert. denied* 420 U.S. 948 (Federal Power Act).

In the orders under review in this case, the Commission (l) purported to bar indefinitely the implementation of tariffs which contained allocation mechanisms deviating from the one required by Order No. 29 unless and until the Commission had granted special permission for the tariffs to go into effect and (2) did so without first making any finding that the allocation mechanism it prescribed by the rule is necessary or appropriate to achieve the purposes of section 401 of the NGPA. The Commission issued the order, in fact, in the face of evidence provided to the record showing that, in some circumstances, the allocation mechanism required will have

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record," American Smelting & Refining Co. v. FPC, 494 F.2d 925, 933 (D.C. Cir. 1974), *cert. denied* 419 U.S. 882(1974). In such a case a moratorium on section 4 filings may be upheld to preserve the effectiveness of the Commission's actions under section 5. *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968). The Commission has conceded that in this case it has made no attempt to follow the requirements of section 5 (A.293). Its allocation mechanism was imposed without any assessment of its impact and without any finding that it was needed or appropriate.

totally inappropriate results. (*See* discussion of the panel at A.30 n. 15).

In affirming the Commission on this point, the panel cited no statutory authority other than the Commission's general rulemaking power under section 16 of the Natural Gas Act and Section 402(b) of the Department of Energy Organization Act.[12] The panel's decision, which was adopted as its own by the *en banc* court, conflicts squarely with a number of other leading decisions.

The Second Circuit, construing parallel provisions of the Communications Act of 1934, 47 U.S.C. §§ 151 *et. seq.*, conducted a painstaking analysis of the relationship between the tariff filing provisions of the Communications Act and the powers of the Federal Communications Commission under its general rulemaking authority. *American Telephone & Telegraph Co.* v. *FCC*, *supra*, 487 F.2d 865, 876-80 (2d Cir. 1973). In that case, on facts similar to this case, the Second Circuit struck down an order of the FCC which barred the filing and implementation of new tariffs until the Commission had granted "special permission" for them to be filed. The Second Circuit held that the rulemaking authority of the FCC did not authorize it to require a carrier to seek "special permission" before filing a new tariff. Construing parallel

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[12] Section 16 of the Natural Gas Act 15 U.S.C. § 717o, authorizes the Commission to make such rules "as it may find necessary or appropriate to carry out the provisions of this chapter." Section 402(h) of the Department of Energy Organization Act, 42 U.S.C § 7172(h) is likewise but a grant of general authority to prescribe rules "with respect to" FERC's functions. Neither provision authorizes the agency to overlook the statutory five month limitation on the suspension period.

provisions of the Communications Act, the Second Circuit said:

> What is determinative in the instant case is the incontrovertible fact that the special permission provision under review had the same effect as a Section 205 rate prescription. It compels the carrier to adhere to a fixed rate which can be revised only with prior Commission permission. Section 205 provides, however, that before the Commission can exercise that authority, hearings must be held and the prescribed rates must be found just and reasonable. To permit the Commission to achieve the same result as it would pursuant to a Section 205 rate prescription, by circumventing the statutory hearing and finding requirements on the basis of its claimed broad inherent regulatory power would defeat the purpose of Section 205 and vitiate the specific statutory scheme. . . . *There is no regulatory authority granted to the Commission by virtue of its power to regulate the communications and broadcasting industries which permits it to circumvent the statutory plan of carrier initiated rate changes, a limited suspension period, rate refunds, and rate prescriptions only after a full hearing and specific findings.*

American Telephone & Telegraph Co. v. *FCC*, *supra*, 487 F.2d at 874-75 (emphasis supplied).

A panel of the D.C. Circuit later followed the reasoning of the *American Telephone & Telegraph* case in *MCI Telecommunications Corp.* v. *FCC*, 561 F.2d 365, 375 (D.C. Cir. 1977), *cert. denied* 434 U.S. 1040 (1978):

> In enacting Sections 203-05 of the Communications Act [parallel provisions to Sections 4 and 5 of the Gas Act], Congress intended a specific scheme for carrier initiated rate [tariff] revisions. A balance was achieved after careful compromise. The Commission is not free to circumvent or ignore that balance. Nor may the Commission in effect rewrite the statutory

> scheme on the basis of its own conception of the equities of a particular situation.

(Footnote omitted, emphasis supplied.)

An earlier decision of a panel of the D.C. Circuit, *Willmut Gas & Oil Company* v. *FPC*, 294 F.2d 245, 250 (1961), *cert. denied*, 368 U.S. 975 (1962), likewise held that the Commission's general rulemaking powers do not by themselves:

> Authorize an order, rule, or regulation which would nullify or restrict the right of a natural gas company to change the rates [tariffs] under which it offers to furnish service, subject only to the requirement of section 4(b) of the Act that it notify the Commission of the changes so that it may proceed under section 4(e).

The D.C. Circuit's decision in this case is also inconsistent with the reasoning of prior decisions of this Court which have found that the maximum suspension period represents a deliberate balancing of interests by the Congress which may not be modified by the Commission or even by the courts. *United States* v. *SCRAP*, 412 U.S. 669, 697, (1973); *Arrow Transportation Co.* v. *Southern Railway Co.*, 372 U.S. 658 (1963).

As additional support for its conclusion that the Commission had acted properly in barring the implementation of section 4 filings which set out allocation mechanisms different from that required by the rule, the panel (A. 35 n. 28) relied on three cases decided under the Natural Gas Act: *Permian Basin Area Rate Cases*, 390 U.S. 747, 781 (1968), *FPC* v. *Texaco, Inc.*, 377 U.S. 33, 39 (1964), and *Pacific Gas & Electric Co.* v. *FPC*, 506 F.2d 33, 41 (D.C. Cir. 1974). Those cases provide no additional basis to support the departure from previously settled precedent which the D.C. Circuit has made in this case. In *Permian*,

a limited (two-and-one-half year) moratorium on future filings for rate increases was upheld as a valid exercise of the Commission' power under *section 5* of the Natural Gas Act. (*See* note 11, *supra*). As the Second Circuit has explained:

> In Permian, however, the moratorium was invoked after the FPC had prescribed agency made rates pursuant to section 5(a) of the Natural Gas Act. The Court in sustaining the moratorium expressly relied upon this prescription authority. 390 U.S. at 778-79. This is a far cry from the Commission's claimed authority to impose the special permission requirement in the instant case. . . .

American Telephone & Telegraph Co. v. *FCC*, 487 F.2d 864 at 888.

The Commission's power to "particularize statutory standards" through the rulemaking process, acknowledged in *FPC* v. *Texaco*, is not relevant to a case in which the Commission has prescribed, in advance, a particular curtailment allocation mechanism without even making findings that that mechanism is necessary or appropriate to achieve the statutory objectives. Finally, the Commission's acknowledged ability to proceed by rulemaking rather than by case-by-case adjudication does not relieve it of its obligation to honor the Natural Gas Act procedures, to analyze the effect of its rule under section 5 of the Natural Gas Act, and to provide "a reasoned opinion detailing those factual elements in the record that underlie the Commission's actions." *Public Systems* v. *FERC*, 606 F.2d 973. (D.C. Cir. 1979) (footnote omitted). None of those requirements were met in this case.

In adopting Part I.C. of the panel's opinion, the Court *en banc* stated that "we adopt the panel's view that the Commission's specific grants of authority under sections 401, 402, 501, and 502 of the NGPA control over the

general requirements of Sections 4 and 5 of the Natural Gas Act," 15 U.S.C. §§ 717c, d. It is doubtful that, by that sentence, the Court intended to supply additional authority on the suspension period issue beyond that supplied by the brief discussion in the panel opinion. In the portion of its opinion which discussed the Commission's power to bar the implementation of tariffs filed under section 4, the panel did not cite sections 401, 402, 501 and 502 of the NGPA, and, by their terms, those sections provide no additional procedural authority for the use of the Commission in implementing curtailments "under the Natural Gas Act."[13]

By affirming the Commission's authority to block indefinitely the pipelines from implementing new tariffs filed under Section 4 of the Natural Gas Act, without first

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[13] Section 401 defines the new curtailment priorities for essential agricultural users and high priority users. It adds no new procedural powers. Section 402 creates a new statutory priority for "process and feedstock" users. It is not relevant to the issues in this case and, like section 401, provides no new procedural powers. Section 501 provides only a general rulemaking authority to the Commission "to prescribe, issue, amend and rescind such rules and orders as it may find necessary or appropriate to carry out its functions under this Act." Like the comparable language in Section 16 of the Natural Gas Act, 15 U.S.C. § 717o, and in the other regulatory statutes, it is a "housekeeping" provision which "does not enlarge the powers of the Commission conferred elsewhere in the Act." Alaska Bulk Carriers Inc. v. Kreps, 595 F.2d 814, 835 n. 108 (D.C. Cir. 1979), *reversed on other grounds*, 442 U.S. 572 (1979) (construing provisions of the Natural Gas Act). Section 502 provides for additional administrative procedures, not relevant here,and it authorizes the Commission to grant adjustments to its rules. The *en banc* court could not have intended to mean that any of those general provisions are "specific" provisions of the NGPA which override the specific limitation on the suspension period established by the Natural Gas Act.

having made a finding that such action is necessary or required to achieve the purposes of the Natural Gas Policy Act, the opinion of the D.C. Circuit *en banc* is so at variance with all other precedent that it approaches plain error. The D.C. Circuit's *en banc* decision confuses and upsets a previously settled body of regulatory law under the Natural Gas Act and other important regulatory statutes. It should therefore be reviewed and corrected by this Court.

B. The Opinion Of The En Banc Court Below Decides Incorrectly The Important Question Of The Relationship Of The Two Statutes Which Govern Natural Gas Curtailments, And The Resolution Of That Question Will Affect The Gas Supplies And Costs Of Millions Of Gas Consumers Across The Nation.

In affirming the Commission, the D.C. Circuit *en banc* wrote that "we adopt the panel's view that the Commission's specific grants of authority under Sections 401, 402, 501, and 502 of the NGPA control over the general requirements of sections 4 and 5 of the Natural Gas Act, 15 U.S.C. §§ 717c, 717d." By that statement, the court seems to find (a) a conflict between the "specific" requirements of one statute and the "general" requirements of the other and (b) the need to reconcile the conflict by causing the provisions of one statute to yield to the provisions of the other. In fact, no conflict, either substantive or procedural, should be found.

Procedurally, the NGPA, by its terms, requires the Commission to implement the requirements of Title IV of the NGPA using its authority "under the Natural Gas Act." NGPA § 403(b). The language of the NGPA permits no procedural conflict between the two statutes.

Substantively, the standard which governs curtailment under the Natural Gas Act is that of Section 4(b),

which provides that no natural gas company shall make or grant any "undue preference or advantage" or "maintain any unreasonable difference" in service. *FPC* v. *Louisiana Power & Light Co.*, *supra*, 406 U.S. 621 (1972). The requirement of the NGPA that curtailment priority schedules be modified need not be inconsistent with the requirement of Section 4(b) that *any* curtailment priority schedule be implemented in a way which does not cause any "undue preference or advantage." There is no necessary conflict there.

In presentations to the agency, and in its brief to the Court of Appeals, Louisiana showed that the allocation mechanism prescribed by Order No. 29, if applied to some pipelines, would result in unlawful discrimination under Section 4(b), as that section has been interpreted by the courts. *E.g.*, *North Carolina* v. *FERC*, 584 F.2d 1003, 1012 (D.C. Cir. 1978); *Sebring Utilities Commission* v. *FERC*, 591 F.2d 1003, 1012 n. 32 (5th Cir. 1979), *cert. denied* 444 U.S. 879 (1979); *City of Wilcox* v. *FPC*, 567 F.2d 394, 410-411 (D.C. Cir. 1977), *cert. denied* 434 U.S. 1012 (1978). In the orders under review, the FERC explained that it does not believe itself bound by "the standards which have historically controlled determinations of lawfulness of curtailment plans under the NGA" (A. 146). Specifically the Commission believed that it was no longer bound, as it was required to do under the Natural Gas Act, to "consider the different impacts of the plan on full and partial requirements customers" because the requirements of the Natural Gas Policy Act are "superimposed" upon the Natural Gas Act standards (A. 146). On rehearing, in Order No. 29-C, the FERC reaffirmed that "the Commission does not believe that *North Carolina* [the interpretation of Section 4(b) given by the D.C. Circuit] controls this rulemaking" (A. 293-94).

In affirming the Commission, the D.C. Circuit *en banc* agreed with the Commission that:

> Section 502(c) of the NGPA is an appropriate mechanism for correcting any inequities in specific plans that follow from application of the generic rule. By its terms, Section 502(c) allows for adjustments "as may be necessary to prevent *special hardship, inequity, or unfair distribution of burdens.* 15 U.S.C. § 3412 [emphasis by the court].

The "special hardship, inequity, or unfair distribution of burdens" standard is a different standard from the "undue preference or advantage" standard of the Natural Gas Act. The Natural Gas Act standard by now benefits from an extensive judicial gloss in the context of curtailments. The section 502(c) standard, by contrast, is new and undefined. Whether the non-discrimination standards of the Natural Gas Act have now been replaced by a "special hardship, inequity, or unfair distribution of burdens" standard is an important legal issue, with enormous practical implications, which should be decided by this Court. The answer to that question will govern gas deliveries and costs to millions of consumers throughout the nation.

CONCLUSION

For the foregoing reasons, Louisiana respectfully requests that the writ of certiorari be allowed.

Respectfully submitted,

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January 28, 1983

STATUTES:

Natural Gas Act Sections 4, 5, 16, 15 U.S.C. §§ 717c, d, o 1a

Natural Gas Policy Act of 1978, Sections 401, 402, 403, 501, 502, 15 U.S.C. §§ 3391, 3392, 3393, 3411, 3412 5a

Department of Energy Organization Act, Section 402(a), (h) 42 U.S.C § 7172(a), (h) 11a

Natural Gas Act Sections 4, 5, 16; 15 U.S.C. §§ 717c, d, o

Section 4, 15 U.S.C. § 717c

(a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from June 21, 1938) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be

made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission or gas distributing company, or upon its own initiative without complaint, at once, and if it so orders without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to

refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

Section 5, 15 U.S.C. § 717d

(a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural-gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule.

Section 16, 15 U.S.C. § 717o

The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this chapter; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified

therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours.

Natural Gas Policy Act §§ 401, 402, 403, 501, 502; 15 U.S.C. §§ 3391, 3392, 3393, 3411, 3412

Section 401, 15 U.S.C. § 3391

Natural Gas For Essential Agricultural Uses

(a) General rule. Not later than 120 days after November 9, 1978, the Secretary of Energy shall prescribe and make effective a rule, which may be amended from time to time, which provides that, notwithstanding any other provision of law (other than subsection (b) of this section) and to the maximum extent practicable, no curtailment plan of an interstate pipeline may provide for curtailment of deliveries of natural gas for any essential agricultural use, unless such curtailment—

(1) does not reduce the quantity of natural gas delivered for such use below the use requirement specified in subsection (c) of this section; or

(2) is necessary in order to meet the requirements of high-priority users.

(b) Curtailment priority not applicable if alternative fuel available. —If the Commission, in consultation with the Secretary of Agriculture, determines, by rule or order, that use of a fuel (other than natural gas) is economically practicable and that the fuel is reasonably available as an alternative for any agricultural use of natural gas, the provisions of subsection (a) if this section shall not apply with respect to any curtailment of deliveries for such use.

(c) Determination of essential agricultural use requirements. —The Secretary of Agriculture shall certify to the Secretary of Energy and the Commission the natural gas requirements (expressed either as volumes or percentage of use) of persons (or classes thereof) for essential agricultural uses in order to meet the requirements of full food and fiber production.

(d) Authority of Secretary of Agriculture to intervene. —The Secretary of Agriculture may intervene as a matter of right in any proceeding before the Commission which is conducted in connection with implementing the requirements of the rule prescribed under subsection (a) of this section.

(e) Limitation. —The Secretary of Agriculture may not exercise any authority under this section for the purpose of restricting the production of any crop.

(f) Definitions. —For purposes of this section—

(1) Essential agricultural use. —The term "essential agricultural use", when used with respect to natural gas, means any use of natural gas—

(A) for agricultural production, natural fiber production, natural fiber processing, food processing, food quality maintenance, irrigation pumping, crop drying, or

(B) as a process fuel or feedstock in the production of fertilizer, agricultural chemicals, animal feed, or food,

which the Secretary of Agriculture determines is necessary for full food and fiber production.

(2) High-priority user. The term "high-priority user" means any person who—

(A) uses natural gas in a residence;

(B) uses natural gas in a commercial establishment in amounts of less than 50 Mcf on a peak day;

(C) uses natural gas in any school, hospital, or similar institution; or

(D) uses natural gas in any other use the curtailment of which the Secretary of Energy determines would endanger life, health, or maintenance of physical property.

Section 402, 15 U.S.C. § 3392

Natural Gas For Essential Industrial Process And Feedstock Uses

(a) General rule. —The Secretary of Energy shall prescribe and make effective a rule which provides that, notwith-

standing any other provision of law (other than subsection (b) of this section) and to the maximum extent practicable, no interstate pipeline may curtail deliveries of natural gas for any essential industrial process or feedstock use, unless such curtailment—

(1) does not reduce the quantity of natural gas delivered for such use below the use requirement specified in subsection (c) of this section;

(2) is necessary in order to meet the requirements of high-priority users; or

(3) is necessary in order to meet the requirements for essential agricultural uses of natural gas for which curtailment priority is established under section 3391 of this title.

(b) Curtailment priority applicable only if alternative fuel not available. —The provisions of subsection (a) of this section shall apply with respect to any curtailment of deliveries for any essential industrial process or feedstock use only if the Commission determines that use of a fuel (other than natural gas) is not economically practicable and that no fuel is reasonably available as an alternative for such use.

(c) Determination of essential industrial use requirements. —The Secretary of Energy shall determine and certify to the Commission the natural gas requirements (expressed either as volumes or percentages of use) of persons (or classes thereof) for essential industrial process and feedstock (other than those referred to in section 3391(f)(1)(B) of this title).

(d) Definitions. —For purposes of this section—

(1) Essential industrial process or feedstock use. —The term "essential industrial process or feedstock use" means any use of natural gas in an industrial process or as a feedstock which the Secretary determines is essential.

(2) High-priority user. —The term "high-priority user" has the same meaning as given such term in section 3391(f)(2) of this title.

Section 403, 15 U.S.C. § 3393

§ 3393.

(a) Establishment of priorities. —The Secretary of Energy shall prescribe the rules under sections 3391 and 3392 of this title pursuant to his authority under the Department of Energy Organization Act to establish and review priorities for curtailments under the Natural Gas Act.

(b) Implementation of priorities. —The Commission shall implement the rules prescribed under sections 3391 and 3392 of this title pursuant to its authority under the Department of Energy Organization Act to establish, review, and enforce curtailments under the Natural Gas Act.

Section 501, 15 U.S.C. § 3411

General rulemaking authority

(a) In general. —Except where expressly provided otherwise, the Commission shall administer this chapter. The Commission, or any other Federal officer or agency in which any function under this chapter is vested or delegated, is authorized to perform any and all acts (including any appropriate enforcement activity), and to prescribe, issue, amend, and rescind such rules and orders as it may find necessary or appropriate to carry out its functions under this chapter.

(b) Authority to define terms. —Except where otherwise expressly provided, the Commission is authorized to define, by rule, accounting, technical, and trade terms used in this chapter. Any such definition shall be consistent with the definitions set forth in this chapter.

(c) Delegation of certain determinations. —The Commission may delegate to any State agency (with the consent of such agency) any of its functions with respect to sections 3315, 3316(b), and 3319(a)(1) and (3) of this title.

Section 502, 15 U.S.C. § 3412

§ 3412. Administrative procedure

(a) Administrative Procedure Act. —Subject to subsection (b) of this section, the provisions of subchapter II of chapter 5 of Title 5 shall apply to any rule or order issued under this chapter having the applicability and effect of a rule as defined in section 551(4) of Title 5; except that sections 554, 556, and 557 of such Title 5 shall not apply to any order under such section 3361, 3362, or 3363 of this title.

(b) Opportunity for oral presentations. —To the maximum extent practicable, an opportunity for oral presentation of data, views, and arguments shall be afforded with respect to any proposed rule or order described in subsection (a) of this section (other than an order under section 3361, 3362, or 3363 of this title). To the maximum extent practicable, such opportunity shall be afforded before the effective date of such rule or order. Such opportunity shall be afforded no later than 30 days after such date in the case of a waiver of the entire comment period under section 553(d)(3) of Title 5, and no later than 45 days after such date in all other cases. A transcript shall be made of any such oral presentation.

(c) Adjustments. —The Commission or any other Federal officer or agency authorized to issue rules or orders described in subsection (a) of this section (other than an order under section 3361, 3362, or 3363 of this title) shall, by rule, provide for the making of such adjustments, consistent with the other purposes of this chapter, as may be necessary to prevent special hardship, inequity, or an unfair distribution of burdens. Such rule shall establish procedures which are available to any person for the purpose of seeking an interpretation, modification, or rescission of, exception to, or exemption from, such applicable rules or orders. If any person is aggrieved or adversely affected by the denial of a request for adjustment under the preceding sentence, such person may request a review of such denial by the officer or agency and may obtain

judicial review in accordance with section 3416 of this title when such denial becomes final. The officer or agency

shall, by rule, establish procedures, including an opportunity for oral presentation of data, views, and arguments, for considering requests for adjustment under this subsection.

(d) Procedures applicable for incremental pricing determinations respecting imports. —Notwithstanding the preceding provisions of this section, any determination made under section 3347(c) of this title shall be made in accordance with the procedures applicable to the granting of any authority under the Natural Gas Act to import natural gas or liquefied natural gas (as the case may be).

Department of Energy Organization Act, § 402(a), (h), 42 U.S.C. § 7172(a), (h)

Jurisdiction of Commission

Transfer of functions from Federal Power Commission

(a)(1) There are hereby transferred to, and vested in, the Commission the following functions of the Federal Power Commission or of any member of the Commission or any officer or component of the Commission:

(A) the investigation, issuance, transfer, renewal, revocation, and enforcement of licenses and permits for the construction, operation, and maintenance of dams, water conduits, reservoirs, powerhouses, transmission lines, or other works for the development and improvement of navigation and for the development and utilization of power across, along, from, or in navigable waters under part I of the Federal Power Act;

(B) the establishment, review, and enforcement of rates and charges for the transmission or sale of electric energy, including determinations on construction work in progress, under part II of the Federal Power Act, and the interconnection, under section 202(b), of such Act, of facilities for the generation, transmission, and sale of electric energy (other than emergency interconnection);

(C) the establishment, review, and enforcement of rates and charges for the transportation and sale of natural gas by a producer or gatherer or by a natural gas pipeline or natural gas company under sections 1, 4, 5, and 6 of the Natural Gas Act;

(D) the issuance of a certificate of public convenience and necessity, including abandonment of facilities or services, and the establishment of physical connections under section 7 of the Natural Gas Act;

(E) the establishment, review, and enforcement of curtailments, other than the establishment and review of priorities for such curtailments, under the Natural Gas Act; and

(F) the regulation of mergers and securities acquisition under the Federal Power Act and Natural Gas Act.

(2) The Commission may exercise any power under the following sections to the extent the Commission determines such power to be necessary to the exercise of any function within the jurisdiction of the Commission:

(A) sections 4, 301, 302, 306 through 309, and 312 through 316 of the Federal Power Act; and

(B) sections 8, 9, 13 through 17, 20, and 21 of the Natural Gas Act.

Rules, Regulations, And Statements Of Policy

(h) The Commission is authorized to prescribe rules, regulations, and statements of policy of general applicability with respect to any function under the jurisdiction of the Commission pursuant to this section.

82-1264

82-1272

Nos.

Office-Supreme Court, U.S.
FILED
JAN 29 1983
ALEXANDER L. STEVAS,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF LOUISIANA,

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,

Respondents,

UNITED GAS PIPE LINE COMPANY,

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,

Respondents.

JOINT APPENDIX TO PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-1336

THE PROCESS GAS CONSUMERS GROUP, ET AL., PETITIONERS

v.

U.S. DEPARTMENT OF AGRICULTURE,
JOHN R. BLOCK, SECRETARY OF AGRICULTURE,
RESPONDENTS

UNITED GAS PIPE LINE COMPANY,
THE BROOKLYN UNION GAS COMPANY,
THE AMERICAN BAKERS ASSOCIATION,
THE FERTILIZER INSTITUTE,
AMERICAN SEED TRADE ASSOCIATION, INC.,
AIR PRODUCTS AND CHEMICALS, INC., ET AL.,
THE UNITED STATES BREWERS ASSOCIATION, INC.,
ATLANTA GAS LIGHT COMPANY,
THE RETAIL BAKERS OF AMERICA,
MISSISSIPPI RIVER TRANSMISSION CORPORATION,
HIGH PLAINS GAS CONSUMER GROUP,
THE AMERICAN TEXTILE MANUFACTURERS INSTITUTE, INC.,
THE DISTILLED SPIRITS COUNCIL OF THE
UNITED STATES, INC.,
COLUMBIA NITROGEN CORPORATION AND NIPRO, INC.,
NATIONAL COUNCIL OF FARMER COOPERATIVES,

PACIFIC GAS & ELECTRIC COMPANY,
THE GREAT WESTERN SUGAR COMPANY,
TENNESSEE GAS PIPELINE COMPANY,
TRANSCONTINENTAL GAS PIPE LINE CORPORATION,
KANSAS-NEBRASKA NATURAL GAS COMPANY, INC.,
ELI LILLY & COMPANY,
PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
NATIONAL INDEPENDENT MEAT PACKERS ASSOCIATION,
NATIONAL SOYBEAN PROCESSORS ASSOCIATION,
INTERVENORS

No. 79-1713

UNITED GAS PIPE LINE COMPANY, PETITIONER

v.

U.S. DEPARTMENT OF AGRICULTURE,
BOB BERGLAND, SECRETARY OF AGRICULTURE, RESPONDENTS

TRANSCONTINENTAL GAS PIPE LINE CORPORATION,
THE PROCESS GAS CONSUMERS GROUP, ET AL.,
THE DISTILLED SPIRITS COUNCIL
OF THE UNITED STATES, INC.,
FIRST MISSISSIPPI CORPORATION,
ELI LILLY & COMPANY,
THE UNITED STATES BREWERS ASSOCIATION, INC.,
PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
AMERICAN PAPER INSTITUTE, INC.,
UNITED DISTRIBUTION COMPANIES, INTERVENORS

Petitions for Review of Orders of the
U.S. Department of Agriculture

No. 79-1449

THE PROCESS GAS CONSUMERS GROUP, ET AL., PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION, RESPONDENT

AMERICAN BAKERS ASSOCIATION,
STATE OF TEXAS,
PUBLIC SERVICE COMMISSION OF THE
STATE OF NEW YORK,
AMERICAN TEXTILE MANUFACTURERS INSTITUTE, INC.,
NATIONAL COUNCIL OF FARMERS COOPERATIVES,
NATIONAL FOOD PROCESSORS ASSOCIATION,
EAST TENNESSEE NATURAL GAS COMPANY, ET AL.,
AMERICAN SUGAR CANE LEAGUE OF THE USA, INC.,
PUBLIC SERVICE ELECTRIC AND GAS COMPANY,
UNITED DISTRIBUTION COMPANIES,
CONSOLIDATED EDISON COMPANY OF NEW YORK,
MISSISSIPPI RIVER TRANSMISSION CORPORATION,
SOUTHERN CALIFORNIA GAS COMPANY,
GLASS PACKAGING INSTITUTE,
PUBLIC SERVICE COMPANY OF NORTH CAROLINA, INC.
AND NORTH CAROLINA NATURAL GAS CORPORATION,
ARMOUR & COMPANY,
ALABAMA GAS CORPORATION,
PUBLIC SERVICE COMMISSION OF NEW YORK,
BROOKLYN UNION GAS COMPANY,
STATE OF OKLAHOMA,
CONSOLIDATED GAS SUPPLY CORPORATION,
HIGH PLAINS GAS CONSUMER CORPORATION,
DISCUS,
BISCUIT & CRACKER MANUFACTURING ASSOCIATION,
AIR PRODUCTS & CHEMICALS, INC.,
FERTILIZER INSTITUTE,
AMERICAN SEED TRADE ASSOCIATION, INC.,
GREAT WESTERN SUGAR COMPANY,
TRANSCONTINENTAL GAS PIPE LINE CORPORATION,

UNITED GAS PIPE LINE COMPANY,
KANSAS-NEBRASKA NATURAL GAS COMPANY,
TENNESSEE GAS PIPELINE COMPANY,
ELI LILLY & COMPANY,
TERA CHEMICALS INTERNATIONAL, INC.,
UNITED STATES BREWERS ASSOCIATION,
FARMLAND INDUSTRIES, INC.,
NATIONAL INDEPENDENT MEAT PACKERS ASSOCIATION,
SOUTHERN NATURAL GAS COMPANY,
NATIONAL SOYBEAN PROCESSORS ASSOCIATION,
PROCESS GAS CONSUMERS GROUP,
AMERICAN MEAT INSTITUTE,
ENTEX, INC.,
NEW JERSEY NATURAL GAS COMPANY,
WASHINGTON GAS LIGHT COMPANY,
ALLIED CHEMICAL CORPORATION,
TENNESSEE GAS PIPELINE COMPANY,
BROOKLYN UNION GAS COMPANY,
AMERICAN MEAT INSTITUTE,
AMERICAN GAS ASSOCIATION, INTERVENORS

No. 79-1511

COLUMBIA GAS TRANSMISSION CORPORATION, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, RESPONDENT

UNITED DISTRIBUTION COMPANIES,
THE UNITED STATES BREWERS ASSOCIATION, INC.,
PUBLIC SERVICE COMMISSION OF NEW YORK,
CONSOLIDATED GAS SUPPLY CORPORATION,
GREAT WESTERN SUGAR COMPANY,
TENNESSEE GAS PIPELINE CO., INTERVENORS

No. 79-1534

UNITED DISTRIBUTION COMPANIES, PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION, RESPONDENT
CONSOLIDATED GAS SUPPLY CORPORATION, INTERVENOR

No. 79-1557

UNITED DISTRIBUTION COMPANIES, PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION, RESPONDENT

No. 79-1568

THE BROOKLYN UNION GAS COMPANY, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, RESPONDENT
PUBLIC SERVICE COMMISSION OF NEW YORK, INTERVENOR

No. 79-1569

STATE OF LOUISIANA, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, RESPONDENT

No. 79-1585

COLUMBIA NITROGEN CORPORATION AND
NIPRO, INC., PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION, RESPONDENT

No. 79-1610

FIRST MISSISSIPPI CORPORATION, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, RESPONDENT

No. 79-1617

ATLANTA GAS LIGHT COMPANY, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, RESPONDENT

No. 79-1655

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, RESPONDENT

No. 79-1765

FIRST MISSISSIPPI CORPORATION, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, RESPONDENT

No. 79-1813

UNITED GAS PIPE LINE COMPANY, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, RESPONDENT

No. 79-2259

THE PROCESS GAS CONSUMERS GROUP, AMERICAN INDUSTRIAL CLAY COMPANY OF SANDERSVILLE AND GEORGIA KAOLIN COMPANY, PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION, RESPONDENT

No. 79-2273

ALLIED CHEMICAL CORPORATION, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, RESPONDENT

No. 79-2297

STATE OF LOUISIANA, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, RESPONDENT

No. 79-2314

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, RESPONDENT

No. 79-2323

THE FERTILIZER INSTITUTE, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, RESPONDENT

No. 79-2352

COLUMBIA GAS TRANSMISSION CORPORATION, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, RESPONDENT

No. 79-2361

THE BROOKLYN UNION GAS COMPANY, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, RESPONDENT

No. 79-2368

UNITED DISTRIBUTION COMPANIES, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, RESPONDENT

No. 79-2369

NATIONAL FOOD PROCESSORS ASSOCIATION, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, RESPONDENT

No. 79-2435

ATLANTA GAS LIGHT COMPANY, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, RESPONDENT

Petitions for Review of Orders of the
Federal Energy Regulatory Commission

Argued June 5, 1980

Decided July 29, 1981

Michael J. Huston with whom *Margaret M. Huff* and *Peter C. Ward* were on the brief, for Eli Lilly & Company, petitioner in No. 79-2409 and Intervenor in Nos. 79-1336, 79-1346, 79-1449, 79-1497, 79-1585, 79-1635, 79-1713, 79-1815, 79-1823 and 79-1824.

Edward J. Grenier, Jr. with whom *Richard P. Nolan, Robert W. Clark, III, David A. Gross, William Wewer* and *William H. Penniman*, were on the brief, for the Process Gas Consumers Group, *et al.*, petitioners in Nos. 79-1336, 79-1346, 79-1449, 79-1497, 79-1635, 79-1824 and 79-2259 and Intervenors in Nos. 79-1449, 79-1585, 79-1588, 79-1617, 79-1713, 79-1815 and 79-1823.

Edward Gerstenfield with whom *Alfred L. Price* was on the brief, for First Mississippi Corporation, petitioner in Nos. 79-1610 and 79-1765 and Intervenor in Nos. 79-1346 and 79-1713.

Stephen A. Herman with whom *James R. Patton, Jr.* and *E. Barsh Jr.*, were on the brief for State of Louisiana, petitioner in Nos. 79-1569 and 79-2297.

Knox Bemis with whom *W. DeVier Pierson, Ross Hamachek, Richard A. Yarmey, M. Frazier King, Jr., Terence J. Keeney* and *Michelle B. Bolton* were on the brief, for United Gas Pipe Line Company, petitioner in

Nos. 79-1713, 79-1813, 79-1814 and 79-1825 and Intervenor in Nos. 79-1336, 79-1346, 79-1497, 79-1581, 79-1585, 79-1588, 79-1823 and 79-1824.

J. Richard Tiano with whom *John R. Schaefgen, Jr.* and *C. William Cooper* were on the brief, for United Distribution Companies, petitioner in Nos. 79-1534, 79-1557, 79-1581, 79-1588, 79-1699, 79-1823 and 79-2368 and Intervenor in Nos. 79-1346, 79-1449, 79-1497, 79-1511, 79-1585, 79-1635, 79-1713, 79-1814, 79-1815, 79-1824, 79-2259, 79-2297, 79-2314. *George L. Weber* and *C. William Cooper* also entered appearances for United Distribution Companies.

John E. Holtzinger, Jr. with whom *Paul H. Keck* and *John T. Stough, Jr.* were on the brief for Atlanta Gas Light Company, petitioner in Nos. 79-1617 and 79-2435 and Intervenor in Nos. 79-1336, 79-1346, 79-1815 and 79-1824.

William I. Harkaway and *G. Douglas Essy* were on the brief for Consolidated Edison Company of New York, Inc., petitioner in Nos. 79-1655, 79-1727 and 79-2314 and Intervenor in Nos. 79-1346 and 79-1449.

Charles M. Darling, IV, and *David T. Douthwaite* were on the brief for Allied Chemical Corporation, petitioner in No. 79-2273 and Intervenor in No. 79-1449.

Fred K. Harvey, Jr. was on the brief for Columbia Nitrogen Corporation, *et al.*, petitioner in Nos. 79-1585 and 79-1815 and Intervenor in Nos. 79-1336, 79-1346 and 79-1824.

Nicholas W. Fels and *Eric A. Eisen* were on the brief, for Air Products & Chemicals Inc., *et al.*, for petitioner in No. 79-2369 and Intervenor in Nos. 79-1336, 79-1346, 79-1449 and 79-1824.

Bruce G. Forrest, Attorney, Department of Justice with whom *Alice Daniel*, Assistant Attorney General, *Anthony J. Steinmeyer*, Attorney, Department of Justice, *Terrence G. Jackson*, Attorney, Department of Ag-

riculture and *Arthur S. Weissbrodt*, Attorney, Department of Energy, were on the brief for respondents in Nos. 79-1336, 79-1346, 79-1497, 79-1581, 79-1588, 79-1713, 79-1814 and 79-2409.

Robert S. Greenspan and *Ronald R. Glancz*, Attorneys, Department of Justice, also entered appearances, for Department of Agriculture, *et al.*

J. Paul Douglas, Assistant Solicitor, Federal Energy Regulatory Commission with whom *Jerome Nelson*, Solicitor, FERC, was on the brief, for respondent in Nos. 79-1449, 79-1511, 79-1534, 79-1557, 79-1568, 79-1569, 79-1585, 79-1610, 79-1617, 79-1635, 79-1655, 79-1699, 79-1727, 79-1765, 79-1813, 79-1815, 79-1823, 79-1824, 79-1825, 79-2259, 79-2297, 79-2314, 79-2323, 79-2352, 79-2361, 79-2368, 79-2369 and 79-2435.

Howard E. Shapiro, Attorney, FERC, also entered an appearance for respondent, FERC.

Gregory Grady with whom *Dale A. Wright*, *Thomas E. Midyett, Jr.* for East Tennessee Natural Gas Company, *et al.*, Intervenor in Nos. 79-1336, 79-1346, 79-1449, 79-1511, 79-1585, 79-1815 and 79-1823.

Edwin H. Pewett, *Allan I. Mendelsohn* and *Michael J. Ruane* were on the brief for National Meat Association, Intervenor in Nos. 79-1336, 79-1346, 79-1449 and 79-1497.

Charles S. Rogers and *Stephen Shanbour*, Assistant Attorneys General, State of Oklahoma, were on the brief for State of Oklahoma, Intervenor in Nos. 79-1449, 79-1497, 79-1585 and 79-2259.

David Hughes and *J. Stuart Fryer*, Assistant Attorneys General, State of Texas, were on the brief, for the State of Texas, Intervenor in Nos. 79-1449, 79-1497 and 79-1585.

Keith R. McCrea and *Douglas O. Waikart* were on the brief, for Glass Packaging Institute, Intervenor in No. 79-1449.

William A. Mogel was on the brief, for Farmland Industries, Inc., *et al.*, Intervenor in Nos. 79-1346, 79-1449, 79-1497 and 79-1585.

Albert J. Feigen was on the brief, for National Soybean Processors Association, *et al.*, Intervenor in Nos. 79-1336, 79-1449, 79-1497, 79-1511, 79-1534, 79-1568, 79-1585, 79-1610 and 79-1823.

Joseph M. Creed was on the brief for Biscuit & Cracker Manufacturers' Association, Intervenor in Nos. 79-1449 and 79-1497.

Joseph S. Fontana was on the brief for Corn Refiners Association, Intervenor in No. 79-1497.

Richard S. Harrell was on the brief, for Distilled Spirits Council of the United States, Inc., Intervenor in Nos. 79-1336, 79-1449, 79-1497, 79-1585, 79-1713 and 79-1823.

Allen K. Harris was on the brief, for High Plains Gas Consumers Group, Intervenor in Nos. 79-1336, 79-1346, 79-1449, 79-1497, 79-1585, 79-1815, 79-1823 and 79-1824.

Donald E. Graham was on the brief, for National Council of Farmers Cooperatives, Intervenor in Nos. 79-1336, 79-1449, 79-1497, 79-1585 and 79-1824.

Gerard Paul Panaro was on the brief, for Retail Bakers of America, Intervenor in No. 79-1336.

James W. Riddell and *John E. Gillick* were on the brief, for the United States Brewers Association, Inc., Intervenor in Nos. 79-1336, 79-1346, 79-1449, 79-1497, 79-1511, 79-1635, 79-1699, 79-1713, 79-1815, 79-1823 and 79-1824.

Michael J. Manning and *Patrick J. Keeley* were on the brief, for ENTEX, Inc., Intervenor in No. 79-1449.

Lewis Carroll and *Susan Low* were on the brief, for Washington Gas Light Company, Intervenor in No. 79-1449.

Joseph P. Stevens, William R. Coleman and *Alvin Adelman* were on the brief, for Brooklyn Union Gas Company, Petitioners in Nos. 79-1568 and 79-2361 and Intervenors in Nos. 79-1336, 79-1346, 79-1449, 79-1635, 79-1699, 79-1814 and 79-2259.

John M. Hill, Giles D.H. Snyder, John D. Daly and *Stephen J. Small* were on the brief, for Columbia Gas Transmission Corporation, Petitioner in Nos. 79-1511 and 79-2352 and Intervenor in Nos. 79-1497, 79-1585, 79-1635, 79-1815 and 79-1823.

Peter H. Schiff, General Counsel, Public Service Commission of the State of New York, and *Richard A. Solomon* were on the brief, for Public Service Commission of the State of New York, Intervenor in Nos. 79-1336, 79-1346, 79-1449, 79-1497, 79-1511, 79-1568, 79-1585, 79-1713, 79-1823, 79-1824 and 79-2259.

Roy R. Robertson, Jr., William A. Major, Jr. and *Ronald L. Kuehn, Jr.* were on the brief, for Southern Natural Gas Company, Intervenor in Nos. 79-1449, 79-1585 and 79-1610.

Melvin Richter was on the brief, for The Great Western Sugar Company, Intervenor in Nos. 79-1336, 79-1346, 79-1449, 79-1511, 79-1585, 79-1815 and 79-1824.

George J. Meiburger and *Frank X. Kelly* were on the statement in lieu of brief, for Northern Natural Gas Company, Intervenor in Nos. 79-1346, 79-1449, 79-1497 and 79-2273.

William W. Bedwell was on the statement in lieu of brief, for Mississippi River Transmission Corporation, Intervenor in Nos. 79-1336, 79-1346, 79-1449, 79-1824, 79-2259 and 79-2314.

Thomas F. Ryan, Richard T. Boone and *Robert G. Hardy* entered appearances for Transcontinental Gas Pipe Line Corporation, Intervenor in Nos. 79-1336, 79-1346, 79-1449, 79-1497, 79-1585, 79-1635, 79-1713, 79-1815, 79-1823, 79-1824 and 79-1825.

John P. Furman entered an appearance for Kansas-Nebraska Gas Company, Inc., Intervenor in Nos. 79-1336, 79-1346, 79-1449, 79-1497, 79-1815, 79-1823, and 79-1824.

Ronald D. Eastman and *Lynda S. Mounts* entered appearances for American Textile Manufacturers Institute. Inc., Intervenor in Nos. 79-1336, 79-1346, 79-1449, 79-1497 and 79-1585.

Malcolm H. Furbush, Joseph S. Englert, Jr. and *Peter W. Hanschen* entered appearances, for Pacific Gas & Electric Company, Intervenor in Nos. 79-1336 and 79-1346.

Ridgon H. Boykin entered an appearance for American Paper Institute, Inc., Intervenor in Nos. 79-1449, 79-1497 and 79-1713.

Christopher T. Boland and *John F. Harrington* entered appearances for Texas Gas Transmission Corporation, Intervenor in Nos. 79-1823 and 79-1824.

Frederick Moring and *Joseph M. Oliver, Jr.* entered appearances for New Jersey Natural Gas Company, Intervenor in Nos. 79-1449 and 79-1727.

G. William Fowler entered an appearance for West Texas Gas, Inc., Intervenor in No. 79-1497.

Karol Lyn Newman entered an appearance for Consolidated Gas Supply Corporation, Intervenor in Nos. 79-1449, 79-1511, 79-1534 and 79-1585.

Harold L. Talisman and *A. S. Lacy* entered appearances for Alabama Gas Corporation, Intervenor in No. 79-1449.

F. Kent Burns and *Donald W. McCoy* entered appearances for Public Service Company of North Carolina, Inc., *et al.*, Intervenor in No. 79-1449.

John S. Fick entered an appearance for Southern California Gas Company, Intervenor in Nos. 79-1449 and 79-2297.

Before: MACKINNON, ROBB, and WALD, *Circuit Judges.*

Opinion *Per Curiam.*

Circuit Judge WALD dissents in part.

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Per Curiam.

Before the court are petitions for review of the interrelated actions of the Department of Agriculture (USDA), the Department of Energy (DOE), and the Federal Energy Regulatory Commission (FERC). These actions implemented provisions of Title IV of the Natural Gas Policy Act of 1978 (NGPA), 15 U.S.C. § 3391 *et seq.*, which require the creation of rules to govern the natural gas curtailment plans of interstate pipelines.

The NGPA was in part a reaction to the effects that recurring natural gas shortages were having on agricultural production. The pipelines had been required to file "curtailment plans" for the allocation of natural gas deliveries among the pipelines' customers in times of shortage. Section 401(a) of the NGPA, 15 U.S.C. § 3391 (a), directed the Secretary of Energy to promulgate, by March 9, 1979, rules to protect "essential agricultural users" from curtailment of natural gas deliveries, except to the extent that curtailment was necessary to reserve natural gas for certain "high priority users" or was consistent with the "requirements of full food and fiber production."

The NGPA required action not only by DOE but also by USDA and FERC, a commission within DOE. Section 401(c) of the NGPA states that the Secretary of Agriculture shall certify to DOE and FERC the natural gas requirements for "essential agricultural use," which is defined as that natural gas use "which the Secretary . . . determines is necessary for full food and fiber production." *Id.* at § 401(f)(1), 15 U.S.C. § 3391(f)(1). FERC is then directed by section 401(b) of the NGPA to consult with USDA and determine if any of the essential agricultural users should be deprived of a section 401(a)

priority because of the availability of an economically practicable alternate fuel. FERC is also charged under section 403(b), 15 U.S.C. § 3394(b), to implement the curtailment priorities that are to be prescribed by DOE, *id.* at § 403(a).

The Secretary of Agriculture conducted a rulemaking proceeding pursuant to his section 401(c)&(f)(1) directive and on March 1, 1979 issued an interim final rule. On May 10, 1979, USDA issued its final rule and its Final Economic and Environmental Impact Statement, which stated that environmental impacts were not significant. The final rule certified that agricultural users are to receive 100% of actual current requirements (rather than some percentage of past usage). Petitioners challenge both the adequacy of USDA's Impact Statement (See Part III.A *infra*) and the propriety of its section 401(c) certification (See Part II.A.1.).

DOE, meanwhile, was preparing, through its Economic Regulatory Administration (ERA), a proposed rule under section 401(a) of the NGPA to define the scope of the "high priority uses" that would receive preference over essential agricultural uses in pipeline curtailment plans. Section 401(f)(2) of the NGPA defines "high-priority user" to include homes, schools, hospitals, small businesses, and those who use natural gas to maintain life, health, or physical property. ERA's final rule provided (1) that the "life-health" part of the statutory definition should not cover the use of natural gas to produce health-related products such as pharmaceuticals; (2) that one may be a high priority user without demonstrating the lack of an alternative fuel; and (3) that plant protection gas is entitled to high priority only when operations of the plant are shut down. Various petitioners

challenge all three of these conclusions. (See Parts II.B.1, II.B.2, II.B.4.).

FERC engaged in rulemaking to implement the determinations of USDA and ERA. After adopting an interim rule effective through the end of October 1979, it adopted on May 2, 1979 a final rule in its Order No. 29, which was clarified or modified in Orders Nos. 29-A, 29-B, and 29-C.[1] The final rule, although adopting USDA's certification of volumetric requirements for essential agricultural use on the basis of current demand, does not require pipelines to deliver quantities of natural gas in excess of the volumetric limitations established by exist-

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[1] United Distribution Companies, The Brooklyn Union Gas Company, Columbia Gas Transmission Corporation and Washington Gas Light Company (the UDC Group) seek to preserve a substantive attack made on the now-expired Interim Curtailment Rule (the Interim Rule), 18 C.F.R. § 281.101 *et seq.*, Joint Appendix (J.A.) at 198-247, on the grounds that some pipeline deliveries were in fact made to competing agricultural users on the basis of the Interim Rule and on the grounds that in certain instances the effect of the Interim Rule has been perpetuated either by FERC's approval of curtailment plan settlements made under the Interim Rule or by FERC's granting extensions of time to file the curtailment plans required by the final rule. Although insisting that the Interim Rule has continuing effect, the UDC group does not point to a single claim made with respect to the Interim Rule that is distinguishable from the claims it vigorously urges upon this court in its challenge of FERC's final rule (Order No. 29). In fact, it states, "the Commission committed substantially the same errors in its promulgation of the Interim Curtailment Rule and Order No. 29." Reply Brief for UDC Group at 28. To the extent the Interim Rule survives, therefore, the issues raised by the UDC Group are resolved in our discussion in the text of the various arguments made with respect to the Commission's final rule. Whatever live issues remain are subsumed within the more general attack upon the final rule; separate treatment of these issues is accordingly unnecessary.

ing contracts or certificates of public necessity and convenience. Agricultural petitioners challenge the contract or certificate limitation, while industrial petitioners challenge the adoption of USDA's certification of current demand. (See Part II.A.2.) At the same time, in another challenged decision, FERC determined that the requirements for "high priority users" could be calculated by reliance on historical usage. (See II.A.3.) A third challenged aspect of the rule is its provision of an attribution mechanism to permit persons receiving gas from more than one source to allocate their priority needs among the sources. (See Part I.C.)

Also challenged here are a number of omissions from the rule. FERC declined to address the treatment of "capacity curtailments," which are caused by insufficient pipeline facilities (as opposed to insufficient supply of natural gas), leaving this problem to be remedied by the complaint procedures of the Natural Gas Act, 15 U.S.C. § 717. This decision is challenged by agricultural petitioners. (See Part I.A.) Agricultural petitioners also challenge FERC's refusal to require the pipelines to monitor the redelivery of natural gas by local distribution companies to see if gas delivered for essential agricultural uses actually reaches them. (See Part I.B.) Other petitioners challenge FERC's decision basically to maintain the existing priorities accorded to storage gas. (See Part II.B.3.) A final challenge to Order No. 29 is that FERC erred in deciding to consider the alternate fuel capability of essential agricultural users in a separate rulemaking proceeding. (See Part III.B.)[2]

Meanwhile, in another proceeding also involved in these consolidated cases, FERC adopted, in Order No. 27, a

[2] While we review the rule that FERC has already placed in effect, we note that a proposed new rule, 45 Fed. Reg. 49087 (1980), could alleviate several of the concerns petitioners express here.

rule implementing section 608 of the Public Utility Regulatory Policies Act of 1978, which clarified FERC's power to authorize, by issue of certificates of public convenience and necessity, direct sales of natural gas for "high-priority uses, as defined, by rule, by the Commission." The "high-priority use" definition developed in FERC's final rule included essential agricultural users protected by NGPA section 401. Petitioners challenge FERC's decision to limit its certificate to terms of five or ten years and to exclude from the program natural gas from the Outer Continental Shelf. (See Part II.B.5.)

We generally affirm the rulemakings in question, but vacate and remand to FERC for further proceedings concerning its imposition of base-year volumetric limits on high priority users and its denial of high priority status to plant protection gas used in operating plants.

It is imperative to define from the outset the narrow scope of our review, which was emphasized by the Supreme Court in *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971):

> [The reviewing court] must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. . . . Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. *The court is not empowered to substitute its judgment for that of the agency.* [Emphasis added.]

This court has described the standard of review as involving three parts:

> First, to insist upon an explanation of the facts and policy concerns relied on by the Agency in making its decisions; second, to see if those facts have some basis in the record; and finally, to decide

> whether those facts and those legislative considerations by themselves could lead a reasonable person to make the judgment that the Agency has made.

Weyerhauser Co. v. Costle, 590 F.2d 1011, 1027 (1973). It is clear from these cases that the scope of review is severely circumscribed. It does not allow us to approach the case from the angle of what we consider preferable, but rather requires us to decide whether the choice elected by the responsible agency is within the ambit of its discretion, and supported by the record, that is, whether it is the product of reasoned decision making.

I. Defining the Curtailment Plans' Coverage

A. *Capacity Curtailment*

The final rule promulgated by FERC applies only to curtailments caused by shortages in supply; it excludes curtailments caused by a pipeline's lack of capacity to deliver the gas it has agreed to deliver. 18 C.F.R. § 281.203(a)(6), Joint Appendix (J.A.) at 344.

The Agricultural Petitioners argue that FERC's rules should implement the priorities established by the NPGA for capacity curtailments as well as supply curtailments.[8] They contend that the NPGA does not distinguish between supply curtailments and capacity curtailments, noting that the statute provides that "no curtailment

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[8] The Commission argues that we lack jurisdiction to decide this issue because it was not raised by any petitioner in a petition for rehearing. Relying upon Ecee, Inc. v. FERC, 611 F.2d 554 (5th Cir. 1980), the Commission contends that a petition for rehearing is a jurisdictional prerequisite to judicial review of rules it promulgates under the NGPA. We note, however, that the petition for rehearing of the Fertilizer Institute, one of the parties which joined the Agricultural Petitioners' brief, does raise the capacity curtailment issue. *See* J.A. 1702-03. The issue is therefore properly before this court.

plan of an interstate pipeline" may provide for curtailment except in accord with the priorities it establishes. NPGA §§ 401, 402, 15 U.S.C. §§ 3391, 3392. Petitioners point out the effects of curtailment upon users of gas are the same, regardless of whether the curtailment is caused by inadequate supply or inadequate capacity.

United Gas Pipe Line Company argues in its intervenor's brief that capacity curtailments are unique and are unsuited to resolution by imposition of end-use priorities. It argues that this is a strong indication that Congress did not intend the NGPA to apply to capacity curtailments.

The Commission, while arguing that "[i]t was supply, not capacity, curtailments which provided the impetuous [sic] for introduction of legislation which became the NGPA," Br. at 55 (citing H.R. Rep. No. 95-543, Vol. II at 383-92, 537 (1977); S. Rep. No. 95-436 at 8, 15-16, 17-19, 25 (1977)), does not contend that the NGPA is inapplicable to capacity curtailments. Its decision on rehearing noted that curtailments in recent years have largely been caused by supply shortages and that capacity curtailments have been relatively rare. It therefore declined to prescribe a general rule applicable to capacity curtailments, stating that persons faced with capacity curtailments who believe that the NGPA should be applicable to them "may avail themselves of their Natural Gas Act remedies." J.A. 405. These remedies include the filing of a complaint pursuant to section 5 of the Natural Gas Act, 15 U.S.C. § 717d, alleging that a pipeline's existing curtailment plan is "unjust, unreasonable, unduly discriminatory, or preferential," because it does not apply to capacity curtailments. They may also seek an adjustment requiring that FERC's rules on curtailment as applied to a particular pipeline be modified to include capacity curtailments. *See* 18

C.F.R. § 1.41 (1980). In short, FERC's refusal to prescribe a general rule for capacity curtailments reflects the agency's desire to deal with such curtailments by order on a case-by-case basis as they arise.

We cannot say that the Commission erred in approaching capacity curtailments in this manner, in view of the relative rarity of capacity curtailments in recent years and the substantial discretion afforded to agencies in choosing whether to approach a particular problem by general rulemaking or order. *See NAACP v. FPC*, 425 U.S. 662, 668 (1976); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 291-295 (1974); *SEC v. Chenery Corp.*, 332 U.S. 194, 202-203 (1947); *Office of Communications of the United Church of Christ v. FCC*, 191 U.S. App. D.C. 360, 368, 590 F.2d 1062, 1070 (1978); *British Caledonian Airways, Ltd. v. CAB*, 190 U.S. App. D.C. 1, 11-12, 584 F.2d 982, 992-993 (1978).

We do not view the agency's action as deciding that the NGPA's curtailment priorities are not applicable to capacity curtailments. Rather, it has decided to await a specific case before dealing with that issue.[4] Accordingly, we express no opinion on this question.

B. *The Pass-Through or "Tracing" Issue*

The final rule adopted by FERC delineates the methods by which interstate pipelines are to calculate the volume of high priority and essential agricultural gas each

[4] The Agency's statement that persons facing capacity curtailments "may avail themselves of their Natural Gas Act remedies" does not necessarily mean that the NGPA is inapplicable to capacity curtailments, since FERC's authority to implement the NGPA's curtailment priorities derives from its authority "to establish, review and enforce curtailments from the Natural Gas Act." 15 U.S.C. § 3393(b). We note that ERA has proposed a regulation which defines "curtailment" to include capacity shortages, 45 Fed. Reg. 49101 (1980) (proposed Section 580.02(b)(3)).

should deliver to local distributors. The rule does not require local distributors to follow the same scheme of priorities when delivering the gas to end users. The Agricultural Petitioners[8] argue that the Commission has run afoul of section 401 of the NGPA and section 4(b) of the Natural Gas Act, 15 U.S.C. § 717 *et seq.*, by not extending the priority rules to the local distributors.

Petitioners' NGPA argument is based on the language of section 401(a), which provides that:

> [t]he Secretary of Energy shall prescribe and make effective a rule . . . which provides that, notwithstanding any other provision of law . . . and to the maximum extent practicable, no curtailment plan of an interstate pipeline may provide for curtailment of deliveries of natural gas for any essential agricultural use, unless such curtailment—
>
> (1) does not reduce the quantity of natural gas delivered for such use below the use requirement [certified by the Secretary of Agriculture pursuant to section 401(c)]; or
>
> (2) is necessary in order to meet the requirements of high-priority users.

15 U.S.C. § 3391(a). By this Act Congress instructed the Secretary of Energy to prohibit curtailment plans which cut down the amount of gas available for essential agricultural use for any reason other than making such gas available for high-priority users.

Petitioners argue that any interstate pipeline curtailment plan that does not contain provisions requiring local distributors receiving gas from the pipeline to deliver gas according to the priorities of the pipeline's

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[8] For convenience, the arguments of the Agricultural Petitioners (Br. at 36-52), Allied Chemical (Supplemental Br. and Supplemental Rep. Br.), and Eli Lilly & Co. (Br. at 16 n.21) will be referred to as the arguments of the Agricultural Petitioners.

curtailment plan violates section 401(a). According to petitioners, curtailment plans that do not require the interstate pipelines to police the compliance of local distributors will allow the local gas companies to take delivery of high-priority gas or essential agricultural gas and deliver it to any and all customers. Petitioners want the Commission to require the interstate pipelines to condition delivery of priority gas on the local distributors' promise to follow the priority scheme. According to the petitioners the lack of such provisions in the curtailment plan of an interstate pipeline renders the plan one that "provide[s] for the curtailment of deliveries of natural gas for any essential agricultural use".

We think section 401(a) was not intended to reach the activities of local distributors. The statutory language refers to the curtailment plans of interstate pipelines. During the progress of the NGPA through the Congress the House adopted language which did reach the activities of local gas companies. Section 411(a) of H.R. 8444 provided that:

> Notwithstanding any other provision of law, no pipeline company and no local distribution company may curtail deliveries to any person who uses natural gas for any agricultural use identified as an essential agricultural use by the Secretary of Agriculture . . .

H.R. 8444, 95th Cong., 2d Sess. § 411(a) (1978); 123 Cong. Rec. 26169-70 (1978). This language did not survive the action of the Conference Committee. H.R. Rep. No. 95-1752 at 111-113, 95th Cong., 2d Sess. (1978). The language of section 401(a) does not mention the practices of local distributors. The fair inference from the exclusion of the language of the House Bill is that local distributors are not covered.

The Agricultural Petitioners respond to this legislative history by arguing that the Commission will not be re-

quired to regulate the local distributors if the Commission can require the interstate pipelines to do so. The Petitioners contend that the interstate pipeline should be required to police the priority scheme of the Act through restrictions on delivery of priority gas to non-priority customers.

We think that if Congress had desired to mandate such a system for regulating the thousands of local gas companies in the United States it would have used language similar to that found in section 411(a) of H.R. 8444. While the language that was adopted prohibits interstate pipeline curtailment plans which would divert gas from priority users, it does not prohibit interstate curtailment plans which may result in such diversion by local distributors.

The Agricultural Petitioners also assert that the Commission's final rule will allow the interstate pipelines to file curtailment plans which promote discrimination between local distributors and between end users of natural gas. They argue that the Commission's rule does not comply with section 4(b) of the Natural Gas Act, which provides that:

> No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission,
>
> (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or
>
> (2) maintain any unreasonable difference in rates, charges, service, facilities or in any other respect, either as between localities or as between classes of service.

15 U.S.C. § 717c(b).

This court held in *North Carolina v. FERC*, 584 F.2d 1003 (D.C. Cir. 1978) that under section 4(b) "*discrimi-*

nation resulting from an end-use plan can be justified only to the extent that the plan actually does protect high-priority uses from curtailment ahead of low priority uses." *Id.* at 1012 (emphasis in original). Under the *North Carolina* rule the Commission must scrutinize a curtailment plan to see if its provisions would effectuate the delivery of priority gas to priority customers.

The Agricultural Petitioners assert that, because the interstate pipelines will curtail delivery of gas to the distributors without requiring all local distributors to pass on the gas, undue discrimination will result. Local distributors that do pass through in accordance with the priorities will be disadvantaged as compared with those distributors that ignore the priority scheme.

There is undoubtedly discrimination present when an interstate pipeline delivers more gas to one local distributor than another based on the priority of the local customers. The delivery of differing volumes of gas to local distributors is discrimination that is essential to the protection of high priority and essential agricultural gas users. That plans filed under the Commission's rule will not force the distributors to pass through the priority gas, however, does not render such discrimination "undue" under section 4(b). The discrimination would be present either with such provisions or without. Nothing in the *North Carolina* case requires the Commission to regulate local distributors because some of them may frustrate the priority scheme contained in an interstate pipeline curtailment plan.

The Agricultural Petitioners also assert that the curtailment plans filed under the Commission's rule will impermissibly discriminate between direct customers of the pipelines and those customers who receive their gas through a local distribution company ("indirect customers" of the pipeline). The Petitioners cite *Sebring Utility Comm'n v. FERC*, 591 F.2d 1003 (5th Cir.), *cert.*

denied, 444 U.S. 879 (1979) as their authority. The *Sebring* case involved a pipeline that curtailed service to all direct customers before curtailing service to indirect customers, regardless of priority. Petitioners cannot say that the Commission's final rule allows the interstate pipelines to ignore the priority scheme of the NGPA; instead they contend that a local distributor might deliver priority gas to a non-priority customer. They argue that such action should be attributed to the interstate pipeline that failed to prevent such action. We think, however, that absent some action on the part of the interstate pipeline to cause such a diversion of priority gas the decisions of the local distributors are not attributable to the interstate pipelines; the pipelines would not violate section 4(b) by delivering gas according to the priority scheme of the Commission's final rule.

C. *Allocation Formula*

In Order Nos. 29[6] and 29-C,[7] FERC promulgated a rule establishing a mechanism for determining what percentage of a high-priority customer's needs must be filled by a gas pipeline that had been one of several suppliers to the customer. The rule provides that each pipeline is responsible for supplying a proportion of the customer's high-priority gas needs equal to the pipeline's percentage contribution to the customer's total needs during the base period.[8]

The state of Louisiana and several intervenors[9] ("peti-

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[6] Final Rule, 44 Fed. Reg. 26855 (1979), J.A. 304.

[7] Order Amending Regulation, Grant in Part and Denying in Part Petitions for Rehearing, 44 Fed. Reg. 61338 (1979), J.A. 390.

[8] *See* 18 C.F.R. § 281.209 (1980).

[9] The intervenors include Entex, Inc., Air Products and Chemicals, Inc., Stauffer Chemical Co., and Willamette Indus-

tioners") challenge the rule's allocation formula, arguing that it violates the non-discrimination [10] and procedural requirements [11] of the National Gas Act (NGA), 15 U.S.C. § 717 *et seq.*, and fails to implement the curtailment priorities [12] of the NGPA. We find that the challenged orders fall within FERC's regulatory powers, and that petitioners' other arguments are premature given the acknowledged availability of an adjustment

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tries, Inc. All are full requirement customers of United Gas Co. (United). United filed a brief raising identical issues; the Commission urges us to dismiss its petition for lack of jurisdiction, alleging that it failed to file the timely application for rehearing which FERC contends is a jurisdictional prerequisite to judicial review. *See* note 3 *supra*. We see no reason to decide this legally and factually complex issue; the Commission concedes that each issue addressed by the challenged petitions has been raised in at least one unchallenged review petition, FERC Br. at 94, and thus is properly before the court for decision. *Cf.* Ripon Society v. Nat'l Rep. Party, 525 F.2d 567 (D.C. Cir. 1975) (en banc) (court declined to decide whether Ripon Society had standing, since at least one other named plaintiff had standing to raise each issue).

[10] Section 4(b) of the NGA, 15 U.S.C. § 717c(b), provides that:

> *No natural gas company shall*, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission (1) *make or grant any undue preference or advantage to any person* or subject any person to any undue prejudice or disadvantage, or (2) *maintain any unreasonable difference* in rates, charges, *service*, facilities, or in any other respect, either as between localities or as between classes of service. [Emphasis supplied.]

[11] Petitioners argue that the Commission failed to conform to the procedural mechanisms for implementing and changing curtailment programs contained in sections 4 and 5 of the NGA, 15 U.S.C. §§ 717c-d.

[12] The NGPA curtailment priorities are detailed in section 401 of the Act, 15 U.S.C. § 3391.

procedure. We thus affirm the facial validity of the regulation.

The interim rule [13] promulgated by FERC did not require a specific allocation mechanism. Rather, it directed pipelines to amend their tariffs to provide special relief from curtailment where such relief would be needed to assure delivery of gas to agricultural and high-priority users who would otherwise be curtailed. The gist of petitioners' argument is that only such an *ad hoc* approach is capable of fulfilling the non-discrimination requirement of the NGA as well as effectuating the curtailment priorities established in the NGPA, and thus that the final rule is unlawful on its face. Specifically, petitioners point out that utilization of FERC's allocation formula generates results consistent with the statutory demands only when all pipeline suppliers of a given customer are suffering from the same percentage curtailment in each priority category; in the absence of such identity in curtailment conditions, as was often the case during the gas shortage,[14] high-priority customers of a pipeline could be curtailed while lower-priority needs of customers of the same pipeline were still being serviced.[15]

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[13] Interim Curtailment Rule, 18 C.F.R. § 281.101 et seq. (Mar. 6, 1979), J.A. 198.

[14] Curtailments varied widely, both among sections of the country and among pipelines serving the same geographical area. *See* Note, *Administrative Law—Natural Gas Regulation: FERC Must Consider Actual Impact of Curtailment Plans*, 57 N.C.L. Rev. 287, 299 & n.64 (1979).

[15] Louisiana detailed a hypothetical in which such disparities would result. It is contained at pages 12-14 of the Joint Brief of Petitioner and Intervenors. The example presented below was worked out by a panel of this court in North Carolina v. FERC, *supra*, 584 F.2d at 1013.

> Company A and Company B have identical requirements by priority. If Company A obtained half of its gas from

Petitioners rely on our decision in *North Carolina v. FERC, supra,* for support of their contention that the specification of an allocation mechanism is inherently violative of the statutory commands of the NGA.[16] In that case, the court held that FERC could not impose a curtailment plan with a similar allocation mechanism on a pipeline without considering the actual end-use impact of the plan. The court held that such plans were inherently discriminatory;[17] the only question was thus whether the discrimination was "unreasonable" within the meaning of section 4(b) of the NGA.[18] Acknowledging that discrimination "necessary to assure parity of treatment for equivalent end uses" could be reasonable,[19] the court remanded the case for consideration of whether the plan at issue would in fact assure parity in that particular case.

Transco during the 1972-1973 base period and half from Pipeline X, Transco would be assigned half of each of Company A's priorities. If Transco curtailed at 40% and Pipeline X curtailed at 20%, Company A's curtailment would be 30% of its total supply. If Company B were supplied entirely by Transco, it would be curtailed 40%. If the priority 1 and 2 requirements of each were 65% of its total requirements, Company A would be able to supply all of its priority 1 and 2 needs and have 5% of its total supply available for lower priorities. Company B, on the other hand, would have to curtail its priority 2 market by 5% of its total supply (which may be substantially more than 5% of just its priority 2 market). The effect then is that Company B must curtail a portion of its priority 2 market in order that Company A can sell inexpensive pipeline gas to its priority three market.

[16] *North Carolina* was decided prior to the enactment of the NGPA.

[17] North Carolina v. FERC, *supra,* 584 F.2d at 1011.

[18] *Id.* at 1011-12.

[19] *Id.* at 1012, 1015.

In short, petitioners rely on a case holding enforcement of a curtailment plan in a particular situation arbitrary and capricious on the record of that proceeding for the proposition that the regulation adopting portions of that plan as a model is *per se* unlawful, a logical leap specifically disclaimed by the panel in the earlier case.[20] As FERC has pointed out, *see* Supplemental Br. for Respondent FERC at 7, different standards guide our review of the Commission's promulgation of a rule, and its implementation in a given case. In promulgating general rules, the Commission is not required to determine, and take into account, the actual impact of the rule on each person subject to the rules. *See United States v. Florida East Coast Ry.*, 410 U.S. 224, 246 (1973); *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 749 (1972); *Permian Basin Area Rate Cases*, 390 U.S. 747, 768-774 (1968). Rather, it is free to "reason from the particular to the general," *Assigned Car Cases*, 274 U.S. 564, 583 (1927), and to correct any resultant inequities and hardships by providing exemption procedures. *United States v. Allegheny-Ludlum Steel Corp.*, *supra*, 406 U.S. at 755 (citing *Permian Area Rate Cases*, *supra*, 390 U.S. at 784-786).

In the instant case, the Commission recognized that the allocation formula promulgated in Order Nos. 29 and 29-C might not be the most appropriate rule in all circumstances. Indeed, in Order No. 29-C, the Commission noted:

> In applying Order No. 29, the Commission has not been inflexible. Where the rule was obviously unsuited to the system of a particular pipeline, it has not been applied. The Commission has also evinced flexibility in molding curtailment plans in the settlement context.

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[20] *Id.* at 1013 n.20.

> If petitioners believe the rule unsuited to individual pipeline curtailment plans, the appropriate avenue for relief is a 502(c) adjustment or offer of settlement, not rehearing of the rule.[21]

Some of the petitioners seem to have already successfully utilized this adjustment process.[22]

Petitioners nonetheless claim the adjustment process is inadequate to solve the problems generated by the challenged rule. First, they contend that the adjustment procedure lacks necessary safeguards. However, we neither find nor were given any support for the proposition that the missing safeguards[23] are necessary.[24] Second, petitioners argue the adjustment procedures are likely to be useless, when viewed in the context of the Commission's stated views and actions on related subjects.[25] This fear

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[21] Order No. 29-C, *supra* note 7, 44 Fed. Reg. 61338, 61340 (footnotes omitted), J.A. 398.

[22] The Commission granted United, petitioners' supplier, interim relief which allows United to continue curtailing under its pre-existing curtailment plan. *See* Order of the Director Office of Pipeline and Producer Regulation Granting Interim Relief and Petitions to Intervene and Staying Proceeding, Br. for Respondent FERC app. A. Hearings on a final settlement have been held, and an administrative law judge has recommended that United be given the permanent relief it seeks. The decision of the administrative law judge is currently awaiting consideration by the Commission.

[23] Petitioners decry the supposed lack of interim relief, hearings on adjustment issues, and a deadline for Commission action on adjustment requests. Joint Br. of Petitioner and Intervenors at 25-26.

[24] FERC denies that the safeguards detailed above are missing from the adjustment procedure, *see* Br. for Respondent FERC at 78-79, and United's experience with it tends to bear out FERC's rebuttal. *See* note 22 *supra*.

[25] Petitioners seem most upset by FERC's repeated statements that it does not consider itself bound by *North Caro-*

has not been borne out by actual experience;[26] more importantly, we are not inclined to strike down a rule merely because of a petitioner's fear that the implementing agency may not conduct exemption proceedings in good faith. If the agency actually abuses its authority by refusing in an arbitrary, capricious or unreasonable manner to grant exemptions, petitioners will have every opportunity to attack those refusals at that time.

Finally, petitioners argue that the rule is defective because it "implement[s] and chang[es] curtailment programs" without utilizing the procedural mechanisms established in sections 4 and 5 of the NGA. Petitioners' argument that pipelines must be free to file tariffs without regulatory restraint, however, is contradicted by the words of the applicable statutes[27] and judicial prece-

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lina. Joint Br. for Petitioner and Intervenors at 25-28. They also note that FERC has resisted positions advocated by them in other cases involving similar issues. *Id.* Petitioners appear to interpret each Commission action, however narrow or ambiguous in intent or effect, as directly contrary to their own goals. For example, the Commission is correct in stating that it is questionable whether *North Carolina*, decided under the NGA, binds its actions in this proceeding. *See* H.R. Rep. No. 1752, 95th Cong., 2d Sess. 113 (Commission instructed to reopen curtailment plans in effect under the NGA only to extent necessary to conform with NGPA). Moreover, as discussed above, the Commission bears different evidentiary and analytical burdens when promulgating a rule than when enforcing one in a particular situation. Thus, FERC's disclaimer of *North Carolina*'s effect on this proceeding does not necessarily reflect a similar view of its impact on adjustment proceedings, and need not be read as contrary to petitioners' interests.

[26] *See* note 22 *supra*.

[27] *See* NGA § 4(c), 15 U.S.C. § 717c(c); NGA § 16, 15 U.S.C. § 7170; Department of Energy Act § 402(h), 42 U.S.C. § 7172(h).

den'.[28] The Commission is free to announce constraints on tariff filings in the form of rules, though it must accept or reject rates on their individual merits.[29]

FERC acted within its authority in promulgating the challenged portions of Order Nos. 29 and 29-C. As yet, petitioners have presented no evidence of any abuses in their implementation. The action of the Commission is therefore upheld.

II. Implementation of Statutory Priorities

A. *Setting Volumetric Requirements for Agricultural and High Priority Users*

1. Certification by the Secretary of Agriculture

A major issue in this case is whether USDA erred in certifying that agricultural users are to receive 100% of their demand during curtailment periods. Under the statute, the Secretary of Agriculture is required to certify to the Secretary of Energy and the Commission the natural gas requirements for essential agricultural uses in order to sustain "full food and fiber production." NGPA § 401(c), 15 U.S.C. § 3391(c). The statute defines "essential agricultural use" broadly to include both

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[28] *See* Permian Basin Area Rate Cases, *supra*, 390 U.S. at 777-781 (section 4 not violated by a moratorium on rate increases above a fixed ceiling); FPC v. Texaco, Inc., 377 U.S. 33, 39 (1964) (section 4 does not preclude Commission from particularizing statutory standards through the rule-making process); Pacific Gas & Elec. Co. v. FPC, 506 F.2d 33, 41 (D.C. Cir. 1974) ("Commission free to initiate a rulemaking proceeding to establish a binding substantive rule").

[29] Pipelines, contrary to petitioners' contentions, remain free to file any tariff they choose. The adoption of the challenged rule merely warns them in advance that they will have to justify any disparity from the Commission's norm.

the production and processing of food and natural fibers, including the production of animal feed, fertilizer, and irrigation as well as the more direct uses of natural gas for agricultural uses. NGPA § 401(f)(1)(A)(B), 15 U.S.C. § 3391(f)(1)(A)(B). Resolution of this issue turns on whether USDA correctly interpreted the term "full food and fiber" production in the NGPA. One alternative which USDA could have elected and which is urged in opposition to its 100%-of-demand certification is to limit agricultural users to the amount they consumed during a designated base period. Another alternative would be to allow agriculture users to receive the entirety of their requirements. USDA chose the latter course. The industrial petitioners object to the failure to use a base period measurement as a ceiling. After a careful review of the statute, its legislative history, and the record we find no abuse of discretion by USDA in selecting the certification option which it did.

Because of the high priority status accorded agricultural users by the NGPA, natural gas users with a lower priority argue that failure to use a historical base period permits too high a reliance by agricultural users on natural gas, and would not permit an equitable distribution of limited supplies in times of curtailment. Although the statute and its accompanying legislative history are not crystal clear, we affirm the decision of the USDA to certify 100% of *current* demand without limitations imposed by use of a historical base period.

The starting point in making this determination is the text of the statute itself. NGPA § 401(c) provides that the Secretary of Agriculture

> shall certify to the Secretary of Energy and the Commission the natural gas requirements (expressed either as volumes or percentages of use) of persons

> (or classes thereof) *for essential agricultural uses in order to meet the requirements of full food and fiber production.* [Emphasis added.]

The provision's definitional section, 401(f)(1), defines "essential agricultural use" as one which the Secretary of Agriculture determines is necessary to meet the full food and fiber production level, whether used directly in production, processing, or storage, or as a feedstock for fertilizer, agricultural chemicals, animal feed or food. NGPA § 401(f)(1)(A)(B). That is comprehensive language.

In the absence of any more precise indication from Congress we are left with the task of winnowing the Congressional intent from the text of the statute. In so doing, we give appropriate weight to the interpretation of the statute by the agencies charged with its implementation, USDA and ERA (acting under authority delegated by DOE). *Udall v. Tallman*, 380 U.S. 1, 16 (1965); *United States v. Rutherford*, 442 U.S. 544 (1979); *Kyle v. ICC*, 609 F.2d 540, 542 (D.C. Cir. 1979). The Secretary of Agriculture determined that the statute referred to current demand at the time of the curtailment, thereby rejecting recourse to any historical base periods. The language of the statute and its legislative history are not inconsistent with that interpretation. We therefore affirm that construction.

The record is replete with examples of wasted food, and destroyed fiber, which occurred because of the interruption of natural gas supplies. USDA's public notice, instituting its notice-and-comment rulemaking proceeding, addressed in its background section the importance of natural gas to food and fiber production.[30]

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[30] Natural gas is a crucial energy source in the food and fiber system. It is a major feedstock and fuel in the manu-

Congress was sufficiently concerned with the possible recurrence of this agricultural waste that it explic-

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facture of nitrogen and other fertilizers and pesticides: it powers irrigation pumping and dries crops such as corn, rice, peanuts and hay; and it is the principal fuel for food processing . . . . From input supply to cooking in the home, natural gas is a major fuel used in the food system.

Natural gas is similarly important in fiber production and processing. For instance, it is extensively used in manufacturing fertilizer for cotton production, pumping irrigation water for millions of acres of cotton, and conditioning cotton for ginning and compressing. Natural gas is also used in processing fiber crops throughout the textile industry and in the transformation of raw wood into lumber, pulp, plywood and paper products.

The production and processing of food and fiber commodities is a continuous process. Agricultural activities are biological in nature and involve the growing of plants and animals and the conversion of these perishable commodities into products to feed, clothe and shelter mankind. Once an agritural activity is started, it must be carried through to completion; or significant losses can occur. Consider, for example, the production of milk. Once a cow starts producing milk, she continues to produce through about a 305-day period. This product must be quickly cooled and then processed for use by humans. It is pasteurized, fortified, modified as to fat content, and packaged. If not all is needed as fresh milk, some is processed further into dried skim milk products and butter, evaporated milk, or cheese and whey products. The processing must take place shortly after production, or bacteria can cause the milk to spoil.

Natural gas is also used in the manufacture and sealing of sanitary food containers. Milk carton blanks, for example, are shipped flat from the paper manufacturer to the dairy. As needed, they are creased, formed, filled and sealed. The sealing is performed under an open natural gas or LP gas flame. Temperature is critical to proper sealing. Otherwise, containers leak, and products are no longer in a sanitary environment.

The curtailment of natural gas in the food system is especially burdensome on food industries and, ultimately, on food

itly accorded agricultural users a high priority, and used an expansive definition of agricultural processes. Those policy choices are clear. Equally apparent is the fact that Congress necessarily was aware that expansion of high priority use was at the expense of users further down the priority chain of natural gas consumers, but no less dependent upon gas as an indispensable fuel, or feedstock. But in providing for the allocation of a scarce resource in a time of supply crises, Congress elected to define explicitly certain classes of users, and uses, and define other classes of users or uses with less precision. Congress also estabilised a two tier system to implement this priority system, beginning with the consideration and promulgation of regulations by the agencies, subject to appellate review. This is the stage of the proceeding with which we are here concerned.

In evaluating the USDA determination, we return to the basic premise underlying the NGPA. In the

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supplies. During the winter of 1976-77, certain dairy processing plants faced curtailment of interstate gas supplies. One dairy processing plant was within hours of closing, and the 3,000 dairy farmers who produced milk for the plant were in danger of having to dump their milk because there was no place to store it safely. Natural gas supply was restored in time to avert this closure.

During the winter of 1976-77, several million broiler chickens died in Arkansas because the interstate supply of natural gas was curtailed to feed mills, and feed supplies were exhausted. Broiler processing plants were curtailed with less than 4-hours' notice. Birds had been trucked to the plants for processing, where they froze to death on the trucks.

Disruption of natural gas supplies to the food and fiber sector also results in increased prices to consumers across a broad range of purchases and contributes substantially to inflationary pressures in the general economy. The curtailment priority in Section 401 is designed to avoid such detrimental effects on farmers, agricultural suppliers, processors and marketers, consumers, and the Nation's economy. J.A. 80-82.

most simple terms, it established a method of allocating an important natural resource in a time of supply curtailments. In more detailed and precise terms, it represents a method of allocating an essential natural resource in times of supply crises according to a Congressionally-mandated system of priorities. Implicitly underlying the selection of certain users for high or essential priority status was the realization that other natural gas users would potentially be denied a supply of natural gas which would limit or suspend their operations. The NGPA, in other words, does not represent an ideal allocation of natural gas, nor is it a continuing one, since it operates only in times of curtailments. Rather, it represents an attempt to use a resource during a time of scarcity to further the national well being, as identified and defined by Congress. Given the fact that, including individual households, there are literally millions of natural gas customers, the approach had to be not only as equitable as possible, but also a manageable method of deciding where natural gas should be shuttled in times of shortage.

A further observation of this statutory scheme demonstrates that, given the enormous numbers of users, "bright line" tests were necessary to segregate the various classes of entitlements. Because this system of priorities operates only in periods of shortages, the mechanism is not continuously operative, making compliance difficult for those users who fall into gray areas of priorities. The statute itself addresses the high priority users with sharp definition. And while precise terms are not employed to address the question of what constitutes "full food and fiber production," we find no abuse of discretion by the Secretary of Agriculture in electing to define it as current production.

This definition has the advantage, operationally, of not requiring a mammoth assessment of historical usage. While this alone is not sufficient to compel the result we reach, it provides a guidepost to the purpose of the operative language chosen. Congress expressed a concern regarding the administrative burden in implementing the NGPA's demands. These demands would be magnified by use of a historically based approach to defining full food and fiber production. Taken alone, the Congressional concern with the simple administrative burden of defining and applying an allocation suggests that a historically based approach was not indicated. Taken collectively with the other factors we identify, it leads to the result expressed in this opinion regarding the definition of "full food and fiber production."

If USDA had not selected 100% of current requirements as the benchmark for full food and fiber production, any curtailment would have a deleterious impact on food and fiber producers and processors. Indeed, it was Congressional awareness of the effects of gas interruptions on agriculture and food and fiber industries that led to the elevation of those users above all but the highest priority users: residences; small commercial users; educational and health institutions; and users whose curtailment would "endanger life, health, or maintenance of physical property." NGPA § 401(f)(2)(D). The selection of these users, and the amplification by the Secretaries, did not signal an insensitivity to the needs, or the importance, of other users. Rather, it was a first attempt to ration an important natural resource in times of supply curtailments. As this is a first effort at legislatively establishing allocation priorities, it may well be legislatively amended if experience with allocations require adjustments. Similar adjustments may be made, within the bounds of their discretion, by the Secretaries. However, we do not find these regulations

allowing agricultural users to obtain 100% of current requirements of natural gas to be an abuse of discretion. Consequently, we affirm the certification.

2. Implementation of the Secretary's Certification by the Federal Energy Regulatory Commission

In implementing the essential agricultural use priority, FERC took the view that section 401 of the NGPA requires the pipelines to serve the volumes certified by USDA, provided that the volumes do not exceed limits imposed by contract or certificate. The "Agricultural Petitioners and Supporting Intervenors" claim the essential agricultural users should have received more; various consumer, pipeline, and distribution company interests claim they should receive less.

The agricultural users' argument is most easily disposed of because logically it falls of its own weight. Because the NGPA operates only in periods of shortages of natural gas which result in curtailment of deliveries to users, the priority scheme established by the NGPA is inoperative in times of normal availability of natural gas. If accepted, the option urged by the agricultural users—that they be entitled to receive 100% of their demand free of certificate or contract limitations—would permit them in the times of shortages to receive *more* gas than during ordinary periods of operation. Against the backdrop of the NGPA, this would mean that in a supply crises, during which it is imperative that supplies be most wisely conserved and allocated on a priority basis, agricultural users could receive more gas than during normal supply periods. We find nothing in the statute or the legislative history which compels that paradoxical result. The purpose of a certificate or contract limitation is to permit both supplier and purchaser or user to identify the *maximum* amount of natural gas

which will be delivered to the user. Collectively, these limitations establish a ceiling on the gas use by the larger natural gas users of a particular pipeline. This information is essential to the process of estimating the demand for natural gas.

If the argument urged by the agricultural users were to prevail, it would undo these reasonable supply-demand expectations at a time when the pipeline is incapable of meeting expected demand. Additionally, by recognizing contract or certificate limitations as a ceiling on demand, no violence is done to the statutory intent to assure "full food and fiber production." Contract or certificate terms are objective benchmarks of expected demand for natural gas which may be only one of several fuels available to a particular agricultural user. If an agricultural user, through a certificate or contract provision, has been allocated a specific quantity of natural gas, the agricultural user has tailored its operations using gas to the ceiling expressed by that limitation and must perform its operations with that amount of natural gas during normal supply periods. No reason has been demonstrated why in time of acute shortages, sufficient to require curtailment of deliveries, the ceiling which is adequate during periods of normal supply should become inoperative, and be replaced by a right to make unlimited demands on a sharply reduced supply.

Thus, although Congress was clearly concerned in regards to agricultural users that shortages of natural gas would have a devastating effect on the cost and availability of food and fiber, there is nothing in either the NGPA or its legislative history to suggest that where the agricultural user is subject to a ceiling on demand during periods of normal operation, the supply restriction should become inoperative by the existence of a supply curtailment.

Accordingly, we affirm the use of a certificate or contract provision as a ceiling on the demand for agricultural users.

In contrast to the arguments of the Agricultural Petitioners, who contend they should have received more, the industrial petitioners—the Process Gas Consumers Group (Process Gas), United Gas Pipe Line Company (United), and the United Gas Distribution Companies (UDC)—argue that FERC was too generous in determining allowable volumes for essential agricultural users. While FERC noted that the very nature of a "curtailment" plan required the recognition of contract limits, and that the independent statutory structure supporting the issuance of certificates of public convenience and necessity required the recognition of certificate limits, FERC took the view that "it is required by law to accept the USDA certification to the extent that it is applicable to the curtailment plan of an interstate pipeline." [31]

The industrial petitioners argue in essence that FERC was empowered to engage in substantive review of USDA's section 401(c) certification. We disagree. Section 401(a) requires issuance of a rule that protects essential agricultural users "to the maximum extent practicable," up to and including "the use requirement specified in subsection (c)," subject only to the needs of "high-priority users." That language, we think, fairly implies that it is the Department of Agriculture, and not FERC, that is authorized to ultimately determine the volumetric requirements of essential agricultural users. FERC reasonably concluded that its function was simply to implement the USDA certification to the extent that it applies to a pipeline's curtailment plan. *See generally Udall v. Tallman*, 380 U.S. 1, 16 (1965). To the

[31] Order Denying Rehearing of Interim Curtailment Rule, No. RM 79-13 (June 20, 1979) at 9, J.A. 257.

extent petitioners think the USDA certification is overbroad, they have had the opportunity, which they have exercised, of having the USDA rule reviewed separately. (See Part I.A.1 *supra*.) The availability of such independent review is yet another indication that Congress did not intend to require or authorize FERC to second-guess the Secretary of Agriculture.

3. Retention of Base Years for High Priority Users

Petitioners Atlanta Gas Light Company and Consolidated Edison Company of New York challenge FERC's decision to provide for curtailment of essential agricultural use on the basis of 100% of current requirements while retaining a base-year method for calculating curtailment of supply to other uses of natural gas, including high-priority users. Petitioners challenge this action under two theories. First, they argue that the practical effect of the rule is to subvert the statutory priority scheme of section 401 of the Natural Gas Policy Act. Their second argument is that the retention of base-years for high-priority consumers and abolition of base-years for essential agricultural users is undue discrimination under *North Carolina v. FERC*, *supra*.

Prior to the enactment of the NGPA, the use of base-year periods to calculate curtailment of gas deliveries was the accepted method.[32] Because the Secretary of Agriculture certified 100% of current requirements of certain agricultural users as the essential volume under the Act, FERC was faced with the task of implementing a current requirements quota within a system that

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[32] "In all other respects, it is the Commission's intention to preserve the existing base period data and method of implementation of existing interstate pipeline curtailment plans." Order No. 29, *supra* note 6, 44 Fed. Reg. 26858, J.A. 319.

normally used a historical figure to set future quotas and curtailments. The Commission chose to abandon the base-year method for calculating curtailment of gas deliveries for essential agricultural uses, determining that abandonment was preferable to some kind of base-year method.[33] The Secretary of Agriculture does not certify the volume of high-priority gas, nor does any other agency. The Commission retained the prior base-year method for implementing curtailment of high-priority gas.

Petitioners contend that FERC's action is contrary to the statutory command of section 401 of the NGPA, which provides in relevant part as follows:

> Not later than 120 days after November 9, 1978, the Secretary of Energy shall prescribe and make effective a rule, which may be amended from time to time, which provides that, notwithstanding any other provision of law (other than subsection (b) of this section) and to the maximum extent practicable, no curtailment plan of an interstate pipeline may provide for curtailment of deliveries of natural gas for any essential agricultural use, unless such curtailment—
>
> (1) does not reduce the quantity of natural gas delivered for such use below the use requirement specified in subsection (e) of this section; or
>
> (2) is necessary in order to meet the requirements of high-priority users.
>
> (1) —For purposes of this section—
> The term "essential agricultural use", when used with respect to natural gas, means any use of natural gas—
>
> (A) for agricultural production, natural fiber productions, natural fiber

[33] Order No. 29-C, *supra* note 7, 44 Fed. Reg. 61342, J.A. 405.

processing, food processing, food quality maintenance, irrigation pumping, crop drying, or

(B) as a process fuel or feedstock in the production of fertilizer, agricultural chemicals, animal feed, or food,

which the Secretary of Agriculture determines is necessary for full food and fiber production.

(2) The term "high-priority user" means any person who—

(A) uses natural gas in a residence;

(B) uses natural gas in a commercial establishment in amounts of less than 50 Mcf on a peak day;

(C) uses natural gas in any school, hospital, or similar institution; or

(D) uses natural gas in any other use the curtailment of which the Secretary of Energy determines would endanger life, health, or maintenance of physical property.

15 U.S.C. § 3391(a), (f)(2).

Petitioners argue that section 401 requires that high-priority users be given priority over essential agricultural uses in all cases where such priority is practicable. This requirement is plain on the face of the statute: subsection (a)(2) provides that the delivery of natural gas for essential agricultural use shall not be curtailed unless it "is necessary in order to meet the requirements of high-priority users." Further, Congress apparently understood the plain language of section 401 to establish agricultural and food processing uses as second to high-priority uses. *See* 124 Cong. Rec. 16258 (Sept. 27, 1978) (remarks of Senator Clark and Senator Jackson).

FERC contends that its interpretation of the statute, embodied in the rule challenged by petitioners, is the appropriate interpretation.

> It is the position of the Commission that the measurement of requirements for essential agricultural uses pursuant to one standard and the measurement of requirements for all other end uses pursuant to another standard is a preference mandated by Section 401(c), which gives the Secretary of Agriculture authority to certify the natural gas requirements of essential agricultural uses. The Commission believes that it is required by law to accept that certification to the extent that it is applicable to the curtailment plan of an interstate pipeline. No such provision exists with regard to high-priority users.

FERC Order Denying Rehearing (June 20, 1979), J.A. 256-57.

> The Commission has also stated that: Congress did not mandate . . . high-priority load growth. Thus, to the extent that load growth is required by the USDA rule and the agricultural users (or its local distributor) has [sic] the requisite contractual authority, it is the Commission's view that Congress intended that agricultural load growth be permitted.

Order No. 29, 44 Fed. Reg. 26857, J.A. 316.

FERC has interpreted the statute as requiring it to accept the Secretary of Agriculture's certification of 100% of current requirements. With this we agree.[34] This will allow agricultural load growth. We also agree with the Commission when it says that section 401 does not mandate high-priority load growth. However, there is a logical difference between stating that Congress did not mandate such growth and stating that Congress would allow high-priority load growth to have priority, just

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[34] *See* text accompanying note 31 *supra*.

as it would permit agricultural use to have its priority. The Commission has not explained why Congress would allow only the secondary priority of gas use to expand.

FERC also relies on a passage from a Conference Committee Report which is part of the legislative history of section 401. The passage states:

> For purposes of implementing the section, the Commission is instructed to reopen curtailment plans that are already in effect under the Natural Gas Act only to the extent necessary to . . . bring them into conformity with the new curtailment priority schedule. The conferees were concerned that these changes not burden the Commission with lengthy proceedings which might throw existing curtailment plans into disarray. Therefore, the conference agreement includes the term "to the maximum extent practicable" to assure that the Commission has the necessary flexibility in implementing any changes. . . . [T]he conferees do not intend the reopening of curtailment plans for this limited purpose to result in adoption of a new base year for curtailment purposes.

H.R. Rep. No. 95-1752, 95th Cong., 2d Sess. 113 (1978).

FERC argues that this passage justifies not reopening interstate pipeline curtailment plans which rely on base-years for high-priority users while reopening such plans for essential agricultural users.[35] The Commission is arguing, in effect, that Congress intended to excuse the Commission from reopening curtailment plans in order to protect high-priority users, but required reopening for essential agricultural uses, the second priority. This is inconsistent with the plain language of section 401 and common sense. The Conference Committee Report simply states that the Commission is to have some flexibility in

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[35] Br. for FERC at 62-63.

implementing the priority schedule of section 401. It does not provide support for reversing the statutory priorities by the use of base years to the prejudice of high-priority users, while protecting agricultural users by applying a current requirements method.[36]

The rule finally adopted by FERC retains the base-year method for high-priority gas while abandoning base years for essential agricultural gas. Assuming growth in demand in both classes of consumers, the inevitable result of this dichotomy will be that high-priority gas delivery will be curtailed before the essential agricultural gas delivery. This result is easily seen by comparing the position of a newly installed gas burner in a home with the position of a newly installed gas burner in a food processing plant. The residential heater is a high-priority user under NGPA section 401(f)(1)(A). The burner in the food processing plant is an essential agricultural user under section 401(f)(2)(A). The new burner in the residential building will not be given priority in times of shortage because its volumetric demand will not be reflected in the historical base-year. The new food processing burner will be accorded 100% of its needs because its current requirements are reflected in any plan filed by the interstate pipeline that supplies it directly or indirectly.

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[36] The Commission also cites the Public Utilities Regulatory Policies Act (PURPA) Conference Report, H.R. Rep. No. 95-1750, 95th Cong., 2d Sess. 113 (1978); J.A. 39, as support for its interpretation. One paragraph of the PURPA Report notes that Title IV of the NGPA does not require updating of the base periods on which curtailment plans are based. This no more supports the use of base periods for some classes and not for others than does similar language from the legislative history of the NGPA.

Assuming growth in demand, the impact of shortages and curtailments will be felt by gas companies that have new high-priority customers before it is felt by gas companies with new essential agricultural customers. Of course, any gas distribution company is likely to have a mix of customers. Nevertheless, the implementation of the Commission's rule will curtail deliveries for high-priority users before curtailing deliveries for essential agricultural users. This does not reflect the statutory scheme.

FERC argues that the practical result of a decision requiring similar treatment of high-priority and essential agricultural users will be growth in gas use by high-priority users. The Commission apparently does not favor such growth. This argument leaves the Commission in the untenable position of advocating growth for the second priority consumer class alone while the statutory section at issue requires that the second class of consumers be cut off from gas supplies before the primary class. It would turn the statutory scheme of priorities up side down to allow growth in a lower priority while discouraging it in the primary (high-priority) sector of the economy.

The statute requires FERC to adopt a rule which allows high-priority users of gas to avoid curtailment to the maximum extent practicable. On remand, the Commission will have an opportunity to draft a rule that does not in practice reverse the statutory scheme of section 401.[37]

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[37] Since we find that the Commission is not authorized by the statute to undercut the priority for high-priority users we need not reach the petitioner's second argument.

B. *Defining the Scope of the Priority Classifications*

1. Manufacture of Pharmaceuticals and Medical Devices

Eli Lilly and Company ("Lilly"), a pharmaceutical and medical device manufacturer,[38] contends that not according drug companies status as a high priority user is inconsistent with the requirements of the NGPA. Lilly argues that the interruption of natural gas supplies could have a devastating effect on the production of essential pharmaceutical products and medical devices. Lilly Br. at 2. At the Commission level, Lilly supplemented its public presentation with confidential supporting materials produced under seal.[39] After a full review of the record, we disagree that Lilly is entitled to classification as high priority user.

Lilly requests a blanket high priority status for itself, a status which, if granted, would allow access to natural gas segregated neither on the basis of essential products nor on the basis of those manufacturing processes of essential products which would be devastated by the interruption of gas supplies. And while Lilly portrays the interruption of its manufacturing processes as having a paralyzing affect on the availability of vital pharmaceutical supplies, the materials which it has used to but-

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[38] Lilly is also a petitioner in those cases relating to agricultural production, in its status as a producer of agricultural products.

[39] Lilly did not file these materials with the Court. At oral argument, counsel for Lilly stated that Lilly did not wish to have the materials reviewed by the Court. However, in response to a question, counsel amended that statement to state that review was requested in the event the Court was to rule against Lilly. Review of the documents was made at the outset to assure full review of Lilly's claim.

tress that contention do not support the breadth of the requested exception. We may well agree that the manufacture of a vital drug with a short shelf life is sufficiently essential under the NGPA to justify high priority status, but that is *not* the case which Lilly presents.

Rather Lilly argues for a company and industry-wide priority on the basis of the need to maintain production of products undifferentiated on the basis of their importance in the maintenance of the national health and welfare. Lilly itself is a large pharmaceutical and medical devices manufacturer with over 600 products. J.A. 496. Presumably within its diversified product line, continued manufacture of some products is more essential to the nation than others, either because of the medical application for which they are intended, or because of the nature of the manufacturing process, or the shelf life of the product. Lilly's failure to demonstrate more than the obvious fact [40] that pharmaceuticals and medical devices are more essential than some other items of manufacture does not address the question of the essential nature of

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[40] At Economic Regulatory Administration (ERA) hearings Lilly presented comments which addressed this issue in broad brush fashion:

> Lilly realizes that in an emergency some of its products are more essential than others. However, Lilly drug products and medical devices which are life-saving and life-sustaining or otherwise intended for the diagnosis, prevention and treatment of disease must be considered essential and their production afforded a high priority. [J.A. 49.]

Lilly failed to use this observation to provide *specific* instances of the need for gas supplies to assure the availability of truly life-saving or life-sustaining products, either at the administrative hearings or at the appellate review level.

gas supplies to the pharmaceutical manufacturers under the NGPA.

Consequently we find nothing in the record to justify Lilly's plea for special consideration and affirm the Commission's treatment of pharmaceutical manufacturers.[41]

2. The Alternate Fuel Test for Certain High-Priority Users

In its proposed rules the ERA (see p. 17 *supra*) sought to exclude apartment houses, schools, hospitals

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[41] Because of our disposition of this issue we do not reach the question of whether the case-by-case consideration by FERC that ERA proposed would be an adequate alternative to classification of pharmaceutical manufacturers as high priority users. Although Lilly dismisses this possibility as inadequate on the assumption that FERC-directed relief "would come too late and would be temporary," Lilly Br. at 12, we note that this is an alternative which might be explored given our resolution of the issue.

Lilly also states that it cannot

> hold out much hope that ERA will include the manufacturing of pharmaceuticals as a high-priority use in ERA-R-79-10 [a separate proceeding] in view of ERA's statement at page 61 of the Executive Agencies' [Departments' Joint] Brief that Lilly 'has been expressly informed that its manufacturing processes are not to be included in the high-priority category.

Lilly Reply Br. at 14, n.12.

Lilly takes that statement out of context. In the Departments' brief, the statement is used to refute Lilly's contention that DOE *failed* to address, in its final rule, whether pharmaceutical manufacturers were to be placed in the high priority category as users whose curtailment would endanger "life" or "health." Properly read, the Departments' statement is intended to refute Lilly's contention that it did not consider the question by showing the issue was considered, and that Lilly was expressly advised of its resolution. We do not read the statement to bar Lilly from receiving consideration of its request in the pending separate proceeding.

and similar institutions from the definition of "high priority user" if they had "existing alternate fuel (excluding solar energy) capability in place [or] access to adequate supplies of alternative fuel." 43 Fed. Reg. 54,663 (1978). The agency indicated some doubts as to whether the alternate fuel test was proper, however:

> This exclusion of apartment buildings, schools and hospitals having alternate fuel capability is not explicit in the NGPA, but is consistent with Congress' expressed intent to include in the high priority category only those uses essential to protection of life, health, and physical property, and is also consistent with Congress' priority treatment of essential agricultural uses, which explicitly excludes uses for which there is alternate fuel capability. We specifically invite your comments on whether this exclusion of apartment houses and other multi-unit buildings and schools and hospitals with existing alternate fuel capabilities and access to adequate supplies of those fuels from the definition of high priority users should be changed.

Id. at 54,661.

A majority of the comments received opposed this alternate fuel requirement, and the final rule eliminated it, providing that *any* person using natural gas in a residence or in any school or hospital is a high-priority user. 10 C.F.R. § 580.02(6) (1980). The agency concluded that "in the absence of more explicit statutory support for an alternate fuel test for high priority users, it should be eliminated from the final rule." 44 Fed. Reg. 15,644 (1979).

The Process Gas Consumers Group (Process Gas) challenges the agency's refusal to include the proposed alternate fuel test in the final rule. It argues that the NGPA establishes the highest priority only for natural gas which is "*necessary* in order to meet the requirements of high-

priority users", 15 U.S.C. §§ 3391(a)(2), 3392(a)(2) (emphasis added), and that natural gas is never "necessary" to meet the needs of persons who are capable of using an alternate fuel. Process Gas therefore concludes that ERA erroneously decided that it lacked statutory authority to impose the alternate fuel requirement.

ERA argues that if Congress had intended to impose an alternate fuel requirement upon any high-priority users, it would have done so explicitly. We agree. Congress did impose such a requirement upon the other uses to which it gave priority—essential agricultural users, 15 U.S.C. § 3391(b), and essential process or feedstock uses, 15 U.S.C. § 3392(b).

Such explicit language does not appear with respect to high-priority users, however. If Congress had intended to treat all three priority categories established by the NGPA equally by imposing an alternate fuel test upon each of them, we find it difficult to believe that it would have explicitly imposed such a requirement upon two of the categories, but failed to do so for the third.

Petitioners turn to the legislative history to support their argument. They rely upon the discussion of the definition of high-priority user in the NGPA Conference Report, H.R. Rep. No. 1752, 95th Cong., 2d Sess. 113 (1978):

> The conference agreement includes the House definition of "high priority use" modified to include schools, hospitals, and any other similar institutions for which the Secretary [of Energy] determines that curtailment of natural gas supplies would endanger life, health, welfare, or maintenance of physical property.

Petitioners argue that this passage indicates that schools, hospitals and similar institutions[42] should be

[42] Although petitioners argue that apartment houses should also be subjected to the alternate fuel test, the Conference

considered high-priority users only if the Secretary determines that curtailment of gas service to them would endanger life or health and that the Secretary must take the availability of alternate fuels into account in making this determination. The Conference Report cannot modify the plain language of the statute, however. *See National Small Shipments Traffic Conference v. CAB*, 618 F.2d 819, 831-32 (D.C. Cir. 1980). The statutory language does not support petitioners' contentions. NGPA section 401(f)(2) provides:

> The term "high-priority user" means *any* person who—
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> • • • •
>
> (C) uses natural gas in any school, hospital or similar institution; *or*
>
> (D) uses natural gas in any other use the curtailment of which the Secretary of Energy determines would endanger life, health, or maintenance of physical property.

15 U.S.C. § 3391(f)(2) (emphasis added). The Conference Report is insufficient to override this clear language which indicates that any school, hospital, or similar institution is a high priority user, with no reference to an alternate fuel test, and that *other* uses are eligible for high priority treatment if the Secretary determines that curtailment of gas deliveries to them would threaten life, health or property.

Petitioners contend that the agency placed undue reliance upon comments submitted by Senators Jackson and Ford in reaching its decision on this issue. While such

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Report indicates that apartment houses are residences covered by NGPA § 401(f)(2)(A), 15 U.S.C. § 3391(f)(2)(A), and not schools, hospitals or similar institutions covered by NGPA § 401(f)(2)(C). *See* Conference Report at 113. Thus the section of the Conference Report relied upon by petitioners is inapplicable to apartment houses.

post-passage comments are not part of the legislative history, ERA was certainly entitled to consider them and to adopt views expressed by the Senators if it found them persuasive. We find no indication that ERA gave the Senator's comments undue weight, and we note that others who submitted comments on this issue expressed the same view as the Senators.[43] We therefore find no reversible error due to ERA's consideration of these comments.

3. The Treatment of Storage Gas

The treatment of storage gas, since it is not an "end use" itself, has been a problem ever since the initiation of curtailment based on end use.[44] The supply of gas is fairly steady throughout the year, while demand tends to be seasonal; therefore, many distributors have invested in substantial storage facilities, which are filled during the summer and tapped during the winter. In the curtailment plans now in effect for the individual pipelines, gas delivered for storage was classified either in a specific priority (usually former Priority 2)[45] or allocated

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[43] *See, e.g.*, Comments of Southern California Gas Company, J.A. at 559; Comments of Northern Illinois Gas Company, J.A. at 572-73; Comments of the State of Texas, J.A. at 614-15; Comments of Arkansas Louisiana Gas Company, J.A. at 657.

[44] FERC's general policy that curtailment should be based upon end use was expressed in FPC Order No. 467, 49 FPC 85 (1973). Title IV of the NGPA codified this policy.

[45] See, for example, the priorities established in the curtailment plan approved in 1976 for the Transcontinental Gas Pipe Line Corp., in Opinion No. 778, 10 Fed. Power Serv. (M-B) 5-1045 (1976):

(1) Residential and small commercial requirements less than 50 Mcf on a peak day.

(2) Large commercial requirements of 50 Mcf or more on a peak day, except for commercial boiler fuel require-

among the priorities depending upon how the gas was actually used during the winter. This allocation method has been dubbed "sprinkling." Both methods may have practical problems in implementation, and, according to the Department of Energy (DOE), the "proper priority treatment of storage injection volumes is an issue in our long term review of natural gas curtailment priorities."

In its implementation of DOE's rules under the NGPA, FERC declared that it intended, insofar as it was possible, to maintain the status quo on the treatment of storage gas.[46] Those pipelines which "sprinkled" their storage gas would continue to do so, while those pipelines which assigned storage gas to a particular priority would also continue to do so. The only change resulted from the redefinition of Priority 1 uses, and the insertion of

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ments above 300 Mcf/d; industrial requirement for plant protection, feedstock and process needs; and storage injection requirements.

(3) All other industrial requirements below 300 Mcf/d.

(4) Industrial requirements not specified in (2) (6) (7) (8) and (9) of more than 300 Mcf/d but less than 3000 Mcf/d.

(5) Industrial requirements not specified in (2) (6) (7) (8) and (9) of more than 3000 Mcf/d.

(6) Boiler fuel requirements of more than 300 Mcf/d but less than 1500 Mcf/d.

(7) Boiler fuel requirements of 1500 Mcf/d or more but less than 3000 Mcf/d.

(8) Boiler fuel requirements of 3000 Mcf/d or more but less than 10,000 Mcf/d.

(9) Boiler fuel requirements of 10,000 Mcf/d or more.

This plan was examined by this court and remanded for further proceedings in North Carolina v. FERC, *supra*.

[46] Order No. 29, *supra* note 6, 44 Fed. Reg. 26858, J.A. 322-23.

essential agricultural uses into the particular plan as Priority 2 pursuant to the NGPA, bumping the other priorities (including storage injections) down a step.

A number of petitioners challenged this treatment of storage gas, arguing that in order to adequately protect high-priority, temperature-sensitive consumers, FERC should either mandate sprinkling on all pipelines, or include storage gas in Priority 1 or 2. Some argued that FERC's final rule did not implement, and in fact was inconsistent with, DOE's rule concerning storage. These arguments, rejected by FERC, have been raised here again on review.

Our review of FERC's decision regarding the treatment of storage gas is limited to ascertaining whether that decision is consistent with the NGPA, and to assuring that FERC's treatment of the issue is not arbitrary or capricious. We begin by describing how the storage gas issue was treated in the administrative proceedings following the passage of the NGPA.

No mention is made of the proper treatment of storage gas in either the Act itself or the legislative history. Rather, the Act directs DOE to prescribe regulations necessary to protect essential agricultural uses from curtailment except as necessary to protect higher priority uses.[47] It is then FERC's responsibility to implement DOE's rule, through its authority to establish, review and enforce curtailments under the Act.[48]

In its proposed rule, which DOE described as "a general rule, binding on all interstate pipeline companies," [49] DOE did not discuss the proper treatment of storage gas. However, in an example describing how a curtail-

[47] NGPA § 401(f)(2)(D), 15 U.S.C. § 3991(f)(2)(D).

[48] NGPA § 403(b), 15 U.S.C. § 3393(b).

[49] DOE Notice of Proposed Rulemaking and Public Hearing at 5, J.A. 47.

ment plan under its rule would work, storage injection requirements were assigned a priority immediately following essential agricultural uses.[50] If this example were regarded as "binding," the practice adopted by most pipelines of "sprinkling" their storage gas would appear to be outlawed. DOE received many comments, both from the public and from FERC, urging it to make clear that such was not its intent.[51] Some urged DOE to go further, and to mandate storage sprinkling as the most accurate and equitable way to treat storage under curtailment,[52] while others contended that storage gas should be classified as Priority 1 or 2.[53] In its final rule, DOE addressed the storage gas issue:

> As the FERC and other commenters pointed out, our proposed rule did not address explicitly the manner in which storage injections should be treated in interstate pipeline curtailment plans. The problem is further complicated because the NGPA is silent on this issue. During the consultation process, the FERC recommended that gas injected into storage be given the same treatment under this rule as it is given in interstate pipelines' currently effective curtailment plans, to the extent practicable.
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> Several distribution companies argued that since storage is not an end use but an interim delivery for an end use, the rule should require that the allocations given distributors for storage be in proportion

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[50] *Id.* at 9, J.A. 51.

[51] *See, e.g.*, Comments of Brooklyn Union Gas Company at 3 & n.3 (Jan. 22, 1979), J.A. 662; FERC's "Analysis & Recommendations" with Respect to DOE's Proposed Rule, 44 Fed. Reg. 15471 (1979), J.A. 66-67.

[52] *See, e.g.*, Comments of Brooklyn Union Gas Company (Jan. 22, 1979), J.A. 663.

[53] *See, e.g.*, Comments of United Distribution Companies (Jan. 9, 1979), J.A. 563-564; Comments of Northern Illinois Gas Company (Jan. 19, 1979), J.A. 569-571.

to the actual deliveries made during the storage withdrawal season (winter) to a distributor's customers, an approach referred to as "storage sprinkling". Pipeline companies and others using "block storage" opposed any imposition of "storage sprinkling" where it is not currently included in existing curtailment plans.

The proper priority treatment of storage injection volumes is an issue in our long term review of natural gas curtailment priorities. We do not intend at this time to make a final determination on the treatment of such gas. Yet, because of the importance of filling storage during the summer and protecting gas service to high-priority users and essential agricultural uses, we have added Section 580.03(d) to the final rule. This will also fulfill the FERC's desire to maintain some flexibility to deal with this problem on an operational level.

44 Fed. Reg. 15645 (1979). Section 580.03(d) provided:

(d) Nothing in this rule shall prohibit the injection of natural gas into storage by interstate pipelines or deliveries to its customers for their injection into storage unless it is demonstrated to the Federal Energy Regulatory Commission that these injections or deliveries are not reasonably necessary to meet the requirements of high-priority users of essential agricultural uses.

Id. at 15647.

At this point it became FERC's responsibility to implement the DOE rule. As it had urged should be the practice in commenting on DOE's rule, FERC's general implementation rule provided that storage injections would continue to be classified in the same manner as in the then effective curtailment plan for each pipeline.[84]

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[84] FERC Notice of Proposed Rulemaking at 3, 44 Fed. Reg. 3725 (1979), J.A. 267; Order No. 29, *supra* note 6, 44 Fed. Reg. 26859, J.A. 322-323.

The figures would be juggled, because of the insertion into each plan of a new Priority 2 for essential agricultural uses, and the redefinition of Priority 1 users, but the pipelines which sprinkled would continue to sprinkle, and those which assigned storage gas a single priority would continue to assign it to the same priority, shifted down to accommodate the new Priority 2.

Again there were objections, this time directed to FERC's decision to maintain the status quo on those pipelines which assigned all storage gas to a single priority. The commentators either urged FERC to require all pipelines to sprinkle,[55] or sought reclassification of storage gas to Priority 1 or 2.[56] Some distributors argued that deliveries to high priority customers would not be assured without utilization of storage, and that storage would be discouraged by permitting storage gas, which might ultimately be used to serve Priority 1 or 2 customers, to be categorized as a lower priority. Others contended that placing storage gas in a single priority, when some of it might be used for higher and some for lower priority customers, resulted in an unlawful discrimination among customers in violation of the Act. Finally, some contended that FERC's implementation was inconsistent with DOE's rule 580.03(d), which they interpreted to establish a presumption that storage injections are necessary to meet the requirements of high-priority or essential agricultural users, and thus, by implication, properly classified as Priority 1 or 2.

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[55] *See, e.g.*, Comments of the American Gas Association (Mar. 13, 1979), J.A. 1368; Comments of Brooklyn Union Gas Company (Mar. 23, 1979), J.A. 1609.

[56] *See, e.g.*, Comments of General Service Customer Group (Mar. 20, 1979), J.A. 1441-42; Comments of Northern Illinois Gas Company (Mar. 20, 1979), J.A. 1469-71; Comments of United Distribution Company (Mar. 20, 1979), J.A. 1592-94.

In response to these comments, FERC relied on the directive in the legislative history of the NGPA to the effect that Congress wished the status quo to be disturbed as little as possible in the course of implementing the Act, and curtailment plans altered only to accommodate the new priority for essential agricultural uses.[37] It regarded the following instructions in the Conference Report as clear:

> [T]he Commission is instructed to reopen curtailment plans that are already in effect under the Natural Gas Act only to the extent necessary to adjust those plans to bring them into conformity with the new curtailment priority schedule. The conferees were concerned that these changes not burden the Commission with lengthy proceedings which might throw existing curtailment plans into disarray. Therefore, the conference agreement includes the term "to the maximum extent practicable" to assure that the Commission has the necessary flexibility in implementing any changes.

H.R. Rep. No. 1752, 95th Cong., 2d Sess. 113 (1978). The Commission also believed that its decision was fully consistent with DOE's rule, interpreting section 580.03 (d) as intended to give FERC flexibility in deciding how storage gas should be handled, not mandating any particular treatment in individual curtailment plans. The Commission did point out that its decision not to alter the status quo as to storage gas does not freeze curtailment plans for all time; pipelines are free to file for reclassification in order to implement sprinkling, and pipeline customers who believe that the curtailment plan under which they are operating is inequitable or results in discrimination among customers can initiate individual proceedings challenging the particular plan.

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[37] Order No. 29-C, *supra* note 7, 44 Fed. Reg. 61343, J.A. 408-09.

After consideration of the arguments of the parties, and an examination of the record, we conclude that FERC acted well within its discretion and in accordance with the NGPA in the course it selected. The appropriate treatment of storage gas is indeed a perplexing problem during periods of curtailment, and it appears that there may be some degree of inequity no matter what method is chosen, depending on the individual characteristics of each pipeline and the customers it serves. We cannot fault FERC for refusing at this time to impose a single method on all pipelines, especially since the treatment of storage gas in effect in each individual curtailment plan was selected in the course of individual proceedings in which the pipeline and its customers participated.

Nor do we believe that the NGPA and the rule adopted by DOE *require* any particular treatment of storage gas. It would be anomalous indeed to interpret a statute which makes no mention whatsoever of the proper curtailment treatment of storage gas, passed by a Congress which made explicit its concern that curtailment plans be disturbed as little as possible by implementation of the Act, to *mandate* a fundamental change in FERC's policy of treating the storage gas issue on a case-by-case basis. Furthermore, we think it plain that in promulgating section 580.03(d) DOE was making express its intention *not* to interfere with FERC treatment of storage gas. Its comments on the rule make this clear, when it stated that "FERC recommended that gas injected into storage be given the same treatment under this rule as it is given in interstate pipelines' currently effective curtailment plans, to the extent practicable . . . . [Our final rule will] fulfill the FERC's desire to maintain some flexibility to deal with this problem on an operational level." 44 Fed. Reg. 15645 (1979).

The petitioners argue nevertheless that the Act is designed to protect deliveries to high priority customers,

and that in practical effect the intent of the NGPA will be violated because these customers will not be protected unless storage gas is accorded an equally high priority. To support this broad generalization they assert that much of the gas delivered to high priority customers in the winter is taken from storage,[58] and presumably infer therefrom that were storage not encouraged, there would be insufficient gas to serve high priority customers. We may offer an equally general assertion in response that it seems intuitively that storage gas is normally used to serve *lower* priority customers, since high priority customers are served first and storage gas would be used to supplement deliveries when insufficient gas is available to serve those further down the line. *See City of Wilcox v. FPC*, 567 F.2d 394 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1012 (1978). We suspect that neither generalization accurately reflects the facts in all cases, and we agree with FERC's initial position before DOE that this difficult problem "should depend on case-by-case evaluations of the end uses, as is currently the practice." FERC Analysis & Recommendations, J.A. 66-67. We note that none of the complaining petitioners offer evidence that they will actually be unable to serve high priority customers if storage gas continues to be ranked as it is in present curtailment plans, and further note that procedures exist whereby a "case-by-case evaluation" of the treatment of storage gas may be initiated by either the pipeline or its customers.

Petitioners are in fact attempting to utilize the FERC's implementation of the NGPA as an opportunity to force a complete reexamination of the storage gas issue, an issue which has already been examined (and frequently litigated) in the course of adoption of individual curtail-

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[58] *See, e.g.*, Joint Br. of Atlanta Gas Light Company and Consolidated Edison Company of New York at 30; Br. of United Distribution Companies, et al., at 59.

ment plans, and which is already under reexamination by the DOE.[59] We do not believe Congress intended the limited reopening of curtailment plans necessitated by the passage of the NGPA to be put to this purpose, and FERC acted reasonably in deciding to confine its actions at this time to the immediate task at hand of amending curtailment plans only to the extent necessary to accommodate the new definitions of priority users.

4. Plant Protection Gas

The NGPA's definition of high-priority user includes any person who "uses natural gas in any other use the curtailment of which the Secretary of Energy determines would endanger life, health, or maintenance of physical

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[59] DOE is presently considering a modification of section 580.03(d), the rule set out in text preceding note 54 *supra*. *See* Proposed Rulemaking Concerning Review and Establishment of Natural Gas Curtailment Priorities for Interstate Pipelines, 45 Fed. Reg. 45114 (1980). Its new proposal for section 580.03(d) reads as follows:

> Nothing in this rule shall prohibit the injection of natural gas into storage by interstate pipelines or deliveries to the customers of interstate pipelines for their injection into storage, unless it is demonstrated to the Commission that these injections or deliveries are not reasonably necessary to meet the requirements of high priority or essential agricultural, industrial process and industrial feedstock uses in their respective order of priority.

Though this proposed rule emphasizes more than the existing one that storage gas is subject to the general curtailment priority scheme, the accompanying comments make it crystal-clear that FERC is to retain flexibility for the handling of storage gas. *Id.* at 45104. DOE flatly denies an intent to require any particular treatment of storage gas:

> most agreed that the major purpose of storage injections is to protect high priority customers and that either method would do this. We see no valid reason to mandate that all pipelines use one method or the other . . . . Hence, the proposed rule does not specify a method.

Id.

property." NGPA § 401(f)(2)(D), 15 U.S.C. § 3391(f)(2)(D). ERA, acting for DOE, has exercised the authority granted by this section to include the use of gas "[f]or minimum plant protection when operations are shut down" as a high priority use. 10 C.F.R. § 580.02(b)(6)(iv)(1980). "Plant protection gas" is gas used to protect life or health of personnel in industrial plants and property located there. Some specific examples of plant protection uses are the prevention of equipment freeze-ups and chemical explosions, preservation of produced goods and work in progress, and maintenance of water safety through the elimination of dangerous airborne substances from the plant's atmosphere. It is clear that Congress intended use of gas for plant protection to be a high priority use. *See* NGPA Conference Report at 113 ("maintenance of physical property includes protection of plant property"). The question presented to us by the Process Gas Consumers Group and by United Gas Pipe Line Company is whether ERA acted arbitrarily and capriciously in treating only plant protection gas for plants that are closed as a high-priority use.

Petitioners argue that natural gas is often necessary to protect health and property in plants that are operating, and that nothing in the language or legislative history of the NGPA indicates that Congress intended to limit plant protection gas to closed plants. ERA explained its decision by stating that "natural gas requirements for industrial plant operations may properly be considered as process and feedstock use, which Congress has determined will be protected after essential agricultural uses. The high-priority designation of plant-protection gas is intended to provide gas not for plant operations, but only when operations are shut down and gas is required to prevent damage to the physical plant." 44 Fed. Reg. at 15645.

The decision does not explain why all gas delivered to operating plants "may properly be considered as

process and feedstock use." We note that FERC defined the terms "plant protection gas", "feedstock gas" and "process gas" separately in the rules setting curtailment priorities which it promulgated prior to the passage of the NGPA. *See* 18 C.F.R. § 2.78(c)(6), (7) (1980). As noted above, plant protection gas is used to protect the health of workers and to prevent damage to property in the plant. This use is distinct from process use, *i.e.*, use as a fuel in a manufacturing process, and from feedstock use, *i.e.*, use of gas as a raw material. We can perceive no basis for excluding plant protection gas for operating plants from the definition of high-priority use on the ground that it is actually gas used as a process fuel or as a feedstock.

We recognize that natural gas cannot be earmarked for a particular use when it is delivered to an industrial plant, and that gas intended for plant protection use could be used as a process fuel or as a feedstock. It may well be that giving the highest priority only to plant protection gas for non-operating plants is a reasonable means of insuring that manufacturers do not divert gas intended for plant protection process or feedstock use during curtailment. Since ERA's decision does not discuss this possibility we cannot uphold the rule on this ground. We note that the Process Gas Consumers Group's comments suggested that this problem could be solved by giving highest priority to plant protection gas for operating plants only when no other natural gas is being used for production purposes. J.A. at 629. ERA never responded to this comment but the agency is free to explore the matter on remand.

We believe that the agency acted arbitrarily and capriciously in treating plant protection gas for operating plants as process or feedstock gas. We therefore remand the case to ERA for further proceedings consistent with this section of the opinion.

5. Offshore Gas

In Order No. 27[60] FERC set forth rules governing the use of pipelines to transport natural gas purchased not by the pipeline itself but by certain classes of ultimate consumers. Such purchases are known as "direct sales."[61] FERC authority to certify transportation of direct sales can now be found in the express provisions of section 608 of the Public Utility Regulatory Policies Act of 1978 (PURPA), 15 U.S.C. § 717f(c)(2).[62]

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[60] FERC Order No. 27, Final Rule, 44 Fed. Reg. 24825 (1979), J.A. 448-75 (Order No. 27).

[61] *See, e.g.*, American Pub. Gas Ass'n v. FERC, 587 F.2d 1089, 1097-98 (D.C. Cir. 1978) (per curiam).

[62] That section provides:

> The Commission may issue a certificate of public convenience and necessity to a natural-gas company for the transportation in interstate commerce of natural gas used by any person for one or more high-priority uses, as defined, by rule, by the Commission, in the case of—
>
> (A) natural gas sold by the producer to such person; and
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> (B) natural gas produced by such person.

Id. FERC and its predecessor, the Federal Power Commission (FPC), had previously exercised authority to certify direct sales under Order No. 533, 40 Fed. Reg. 41760, 54 F.P.C. 821 (1975) (Order No. 533), and FERC Order No. 2, 43 Fed. Reg. 5362 (1978) (Order No. 2). The statement of authority under Order No. 533 was affirmed by this court in American Pub. Gas Ass'n v. FERC, *supra*, 587 F.2d at 1097-98. Our blessing of the program was both tentative and limited, however:

> We approve the Commission's plan embodied in Order No. 533 as a legitimate, experimental approach for dealing with the inherently skewed nature of our half-free market.... This approval is as to the general policy, as an

First Mississippi Corporation (First Mississippi) challenges Order No. 27 on two grounds: first, because it excludes from the direct sales program gas produced on the outer continental shelf (OCS gas); and second, because it limits the duration of most direct sale contracts to five years. We find that in the respects in which it is challenged here Order No. 27 represents a reasoned exercise of FERC's discretion and accordingly affirm the Commission.

We find no merit at all in First Mississippi's contention that FERC's five-year limit on contract terms is unreasonably brief.[63] In proposing a five-year term for

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> experimental effort. . . . It is not at this stage to be condemned illegal root and branch.

Id. at 1098. Apparently referring to the cautious language of approval used in *American Pub. Gas*, the PURPA conference committee explained that section 608 of the PURPA, quoted above,

> is intended to remove any uncertainty which may exist regarding the basis for present Federal Energy Regulatory Commission policy regarding the transportation of user-owned natural gas by interstate pipelines. However, the conference substitute is not intended to require the Commission to issue a certificate of public convenience and necessity in any specific case. The question of whether to issue a certificate is left to the Commission based upon its determination of whether the transportation of the gas will serve the public convenience and necessity. In addition, limitations are not imposed on the exercise of this authority by the Commission other than the public convenience and necessity standard which is generally applicable to certification by the Commission of natural gas transportation.

H.R. Rep. No. 1750, 95th Cong., 2d Sess. 119 (1978), J.A. 39, 42.

[63] The Commission allows "eligible users" who own and develop their own reserves to apply for a term of up to 10 years "upon a showing that such longer term is necessary to permit the economical recovery of the reserves." 18 C.F.R.

the classes of eligible users governed by Order No. 27, the Commission was reacting to criticism of the two-year term governing its earlier direct sales program.[64] Some had suggested that a two-year commitment provided insufficient incentive to the development or opening of new sources of gas supply for those customers who might qualify for direct sales.[65] Commenters in *this* proceeding noted, for example, that agricultural plant expansion may depend on assurances that the necessary gas supplies will be available and further suggested that a five-year

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§ 157.105(a)(2), J.A. 472. The extended term is not available to eligible users "who merely acquire reserves-in-place," Order No. 27, *supra* note 60, 44 Fed. Reg. 24828, J.A. 464, nor is it available as a matter of course in any case. The Commission promises only that it will "entertain requests" for such terms. *Id.* The availability of an extended term is meant to provide "eligible users" with an incentive to develop new natural gas supplies. Notice of Proposed Rulemaking at 14, 44 Fed. Reg. 7742 (1979), J.A. 431.

[64] Order No. 27, *supra* note 60, 44 Fed. Reg. 24828, J.A. 463 (preamble) ("[C]omments received during the Commission's consideration of 18 C.F.R. 2.79 indicate that more than two years are required to attract many of the potential sources of new gas supplies"). *See also* Comments of Glass Containers Corporation at 8 (Mar. 20, 1979), J.A. 1859 (favoring new program's "increase in available certificate term over the maximum two year authorization currently available under § 2.79"); Comments of Owens-Corning Fiberglas Corporation at 5 (Mar. 20, 1979), J.A. 1893 (suggesting that certification under new program not be limited to a term of years); Comments of Reynolds Metals Company at 8 (Mar. 20, 1979), J.A. 1901-02 (favoring new program's longer certificate term). Order No. 27 supplements rather than supplants the Commission's direct sale authority already stated in Order No. 533, *supra* note 6, and Order No. 2, *id.*, and codified at 18 C.F.R. § 2.79 (1979). *See* Order No. 27, *supra* note 60, 44 Fed. Reg. 24827, J.A. 459 (preamble). Certificates under 18 C.F.R. § 279 (1979) are limited to a maximum term of two years. *Id.* at § 2.79(i).

[65] Order No. 27, *supra* note 60, 44 Fed. Reg. 24828, J.A. 463.

contract term would not provide the assurance necessary to finance large new capital expenditures.[66] Although acknowledging in its proposed rule the legitimate need of some users for contract terms longer than two years, FERC was also concerned in proposing Order No. 27 that direct sales contracts do not by their duration jeopardize the public interest.[67] The Commission noted in its proposal that "a number of optimistic supply projections have recently been put forward," [68] and evidently relied on these projections and its five-year duration rule to minimize the risk to the public interest by direct sales contracts during this "evident period of transition and uncertainty." [69]

Those who commented on the proposal were divided, some urging a longer term [70] and others arguing for a

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[66] Comments of First Mississippi Corporation at 5 (Mar. 20, 1979), J.A. 1437. *See* Order No. 27, *supra* note 60, 44 Fed. Reg. 24826, J.A. 452 (preamble) (summarizing comments).

[67] Notice of Proposed Rulemaking, 44 Fed. Reg. 7742 (1979), J.A. 430-31. *See also* Order No. 27, *supra* note 60, 44 Fed. Reg. 24828, J.A. 463. It is in part the construct of the program itself which permits the public interest to be jeopardized by direct sales. As promulgated, the program operates outside the framework of curtailment priorities. *See* 44 Fed. Reg. 24826, J.A. 450-51. When the program was first proposed, the FERC solicited comments on the possibility of making direct sales "interruptible" when gas supplies were short, 44 Fed. Reg. 7742 (1979), J.A. 432-33, but in its final rule the agency decided against imposing such a condition on its program, noting that the President is authorized under section 303(d) of the NGPA to redirect direct sales during declared natural gas supply emergencies, 44 Fed. Reg. 24826, J.A. 452-53.

[68] 44 Fed. Reg. 7742, J.A. 430.

[69] *Id.*

[70] Comments of Glass Containers Corporation at 9 (March 20, 1979), J.A. 1860 (favoring availability of ten year term regardless of ownership); Comments of Owens-Corning Fi-

shorter term if the proposal were adopted at all.[71]

We cannot find that FERC acted unreasonably in refusing to extend the permitted term of direct sales contracts beyond the five-year period originally proposed or in failing as an original matter to propose a term longer than five years. Within the context of the program it adopted, the balance of such competing considerations is one best left to the Commission.[72] The record in this case demonstrates that the Commission examined and evaluated those considerations and we will not disturb its decision on the basis of the grounds here advanced.

First Mississippi argues that Order No. 27's exclusion of OCS gas represents a fundamental departure from a major purpose of the NGPA—to create a unitary market

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berglas Corporation at 4-5 (March 20, 1979), J.A. 1892-93 (favoring availability of term for "a period of time necessary to permit the economic development of the reserves whether this period is five years, ten years or twenty years); Comments of Reynolds Metal Company at 9 (March 20, 1979), J.A. 1902 (favoring availability of ten year term regardless of method of acquisition).

[71] Comments of Associated Gas Distributors at 2-3 (March 12, 1979), J.A. 1840-41 (favoring continuation of two year terms); Comments of Northern Illinois Gas Company at 3, 15 (March 20, 1979), J.A. 1866, 1878 (favoring two year term); Comments of Northern Natural Gas Company at 6 (March 20, 1979), J.A. 1887 (favoring two year terms for user purchased transportation, five year terms for user produced transportation).

[72] Arizona Elec. Power Coop., Inc. v. FERC, No. 77-1634, slip op. at 15 (D.C. Cir. May 22, 1980) ("The difficult problem of balancing competing equities and interests has been given by Congress to the Commission . . . [I]t is not the role of the courts to second guess the Commission's judgment . . . so long as the agency's determination has a rational basis").

for all purchasers of natural gas.[73] It is true that through the NGPA Congress intended to merge a badly bifurcated market. Before the NGPA was enacted, intrastate sales were not governed by federal law; the existence of this unregulated intrastate market had enabled sources of gas supply to favor local purchasers willing to pay unregulated prices over interstate pipelines whose offers were not price-competitive.

When gas supplies were short, as they were during the several years preceding enactment of the NGPA, this dual market had operated to curtail severely the gas supplies available to interstate pipelines, effectively forcing pipeline customers to shoulder a very large share of the burden of shortage and creating hardship in certain areas of the country.[74] Merging the markets restored the interstate pipelines' ability to compete for short supplies. It was the special hardship experienced by interstate pipelines and their customers which the NGPA's market merger was designed to rectify. From this perspective a rule which effectively preserves to pipelines certain categories of supply does not seem at odds with the purposes of the NGPA.

OCS gas has been excluded from direct sales since the program's inception in Order No. 533.[75] Congress, in

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[73] Joint Brief for Petitioner First Mississippi Corporation and Supporting Intervenors (hereinafter "Mississippi Brief") at 14-15.

[74] *See* S. REP No. 436, 95th Cong., 1st Sess. 21 (1977) (interstate-intrastate distinction "unworkable" in times of shortage); 11 St. Mary's L.J. 140, 142-45 (1979) (same). *See also* MacAvoy, *The Natural Gas Policy Act of 1978*, 19 Nat. Resources J. 811, 814 (1979) (economic analysis of interstate gas shortage).

[75] Order No. 533 excluded gas obtained from wells located on "off-shore federal domain" from its direct sale policy because:

> One of the main goals of our statement of policy is to make gas otherwise sold only to the intrastate market

ratifying the Commission's exercise of authority over the certification of direct sales, gave no express indication that it intended a change in policy in this respect.[76] First Mississippi, however, argues that section 315 of the NGPA[77] implicitly evinces such an intent. That

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available to the interstate market. The transportation or sale of gas from the offshore federal domain is by definition transported or sold in interstate commerce.

40 Fed. Reg. 41763 (1975). FERC continued this exclusionary policy. *See* Tenneco Oil Co., et al., FERC Opinion No. 10 (March 20, 1978), *reh. denied*, FERC Opinion No. 10-A (June 21, 1978) (denying applications for permits for direct sale of OCS gas). The petitioners are challenging these denials in court, Air Products & Chemicals, Inc. v. FERC, No. 78-2011 (5th Cir.) (consolidated with Public Service Commission of New York v. FERC, No. 78-1572 (D.C. Cir.) (transferred to 5th Cir. May 27, 1980)).

[76] Conference Report for Public Utility Regulatory Policies Act, H.R. REP. No. 1750, 95th Cong., 2d Sess. 118-19 (1978), J.A. 41-42 (§ 7(c) of the Natural Gas Act amended "to remove any uncertainty which may exist regarding the basis for *present* . . . Commission policy regarding the transportation of user-owned natural gas by interestate pipelines . . . [and does not] require the Commission to issue a certificate in any specific case") (emphasis added).

[77] 15 U.S.C. § 3375(b) provides:

(b) Offers; right of first refusal.—

(1) Application.—This subsection shall apply with respect to any natural gas which is committed or dedicated to interstate commerce on November 8, 1978, and which is—

(A) high-cost natural gas (as defined in section 3317(c)(1), (2), (3), or (4) of this title);

(B) new natural gas (as defined in section 3312(c) of this title); or

(C) natural gas produced from any new, onshore production well (as defined in section 3313(c) of this title).

[Continued]

section affords interstate pipelines a right of first refusal and an option to match any offer to purchase certain natural gas "committed to or dedicated to interstate

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[77] [Continued]

This subsection shall not apply to any natural gas committed or dedicated to interstate commerce solely by reason of section 3301(18)(A)(i) of this title.

(2) Offer of sale.—The Commission shall, by rule, require that if natural gas subject to the requirements of this subsection is produced on or after the first day of the first month beginning after November 9, 1978, a bona fide offer to sell such natural gas must be made to the person who, but for the provisions of section 3431(a)(1)(B) of this title (relating to deregulation), would have been entitled pursuant to the commitment or dedication of such natural gas to interstate commerce to receive such natural gas if such natural gas were sold (or any successor in interest to such person).

(3) Right of first refusal.—The Commission shall, by rule, require that following—

(A) the expiration or termination of any contract with respect to the first sale of natural gas subject to the requirements of this subsection to the person who, but for the provisions of section 3431(a)(1)(B) of this title (relating to deregulation), would have been entitled pursuant to the commitment or dedication of such natural gas to interstate commerce to receive such natural gas if such natural gas were sold (or any successor in interest to such person), or

(B) any rejection of any bona fide offer, described in paragraph (2), to sell natural gas subject to the requirements of this subsection,

such person who would have been entitled to receive such natural gas shall be granted a right of first refusal of the first offer to sell such natural gas which, subject to the exercise of any right of first refusal under this paragraph, has been substantially accepted in principle by another person in an arms-length transaction.

commerce." [78] Two categories of natural gas are "committed to or dedicated to interstate commerce" under the NGPA: the first includes gas purchased from a well which sold in interstate commerce before a certain date [79] and the other includes all OCS gas not included in the first category.[80] The NGPA's first refusal and option provision covers only the first category of gas (that included by reason of its prior interstate sale); the advantages afforded interstate pipelines by the first refusal and option provision were not extended to OCS gas.[81] First Mississippi argues that this limitation of the first refusal and option provision manifests an intent to make the second category of gas (OCS gas not previously committed by prior sale) equally available to all.[82] In-

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[78] *Id.*

[79] 15 U.S.C. § 3301(18)(A)(ii) defines the term "committed or dedicated to interstate commerce" to include: "natural gas which, if sold, would be required to be sold in interstate commerce (within the meaning of the Natural Gas Act) under the terms of any contract, any certificate under the Natural Gas Act, or any provision of such Act." The Natural Gas Act, the predecessor of the NGPA, regulated all natural gas flowing in interstate commerce prior to the enactment of the NGPA on November 9, 1978. *See* 15 U.S.C. § 717(b). Therefore, all gas purchased from a well which sold gas in interstate commerce on or before November 8, 1978 is within the definition of gas "committed to or dedicated to interstate commerce" under the NGPA. *See* Conoco, Inc. v. FERC, 622 F.2d 796, 798 (5th Cir. 1980), (NGPA definition of gas dedicated to interstate commerce on November 8, 1978 included all gas from wells leased or even if not flowing in interstate commerce prior to enactment of NGPA).

[80] 15 U.S.C. § 3301 (18)(A)(i).

[81] 15 U.S.C. § 3375(b)(1) explicitly provides that "[t]his subsection shall not apply to any natural gas committed or dedicated to interstate commerce solely by reason of section 3301(18)(A)(i) of this title."

[82] First Mississippi Br. at 11-12.

deed, during debate on the conference substitute the question was quite plainly put on the floor of the House, two conferees asserting that the Act would not affect the Commission's then-existing policies concerning the exclusive use of OCS gas for interstate purposes and one conferee disputing those assertions as an effort to make legislative history.[83]

We do not think either the first refusal limitations of the NGPA or the snatch of debate concerning its implications with respect to OCS gas manifest an intent to require FERC to exercise its transportation certification authority differently than it had in the past. It is not clear that the Congress expressly approved the Commission's policies concerning OCS gas but neither is it clear that by extending only limited competitive advantages to interstate pipelines through section 315 of the NGPA, the Congress meant to preclude the continuation of certain other advantages accruing to such pipelines through preexisting Commission policy.[84]

Direct sale authority was originally asserted by the Commission [85] and approved by this court [86] as a stop-gap measure necessary to improve the competitive position of interstate pipeline customers in a badly-fractured market. Flexibility was and is the hallmark of the Commission's

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[83] 124 Cong. Rec. H13,128 (daily ed. Oct. 14, 1978) (remarks of Reps. Eckhardt, Dingell and Brown).

[84] *See* Conference Report on Public Utility Regulatory Policies Act, H.R. REP. No. 1750, 95th Cong., 2d Sess. 118-19 (1978), J.A. 41-42. *But see* 124 Cong. Rec. S15413 (daily ed. Sept. 19, 1978) (remarks of Sen. Abourezk (noting FERC's inclusion of OCS gas in interstate market); 124 Cong. Rec. 16245 (daily ed. Sept. 27, 1978) (remarks of Sen. Hollings) (same).

[85] Order No. 533, *supra* note 62.

[86] American Pub. Gas Ass'n v. FERC, *supra*, 587 F.2d at 1098.

direct sale authority; it was originally and remains supplemental and discretionary [87]—a means of fine-tuning and adjusting the various problems which may arise during implementation of the Congressionally-prescribed market structure for the sale of natural gas. Direct sale authority must of course be employed in the public interest [88] and should not be used in a manner which defeats or subverts the statutory structure adopted by Congress or which creates perverse analogs to the very problems which underlay Congressional action in 1978.

Since the problems which prompted FERC first to authorize direct sales have been substantially reduced by the NGPA, the purposes which Order No. 27 are designed to serve are quite different. As explained by the Commission, a major problem confronting it in the wake of the NGPA's enactment was how to reconcile the NGPA's priority for essential agricultural users with the "clear Congressional intent to minimize the extent to which present curtailment plans will need to be reformulated to implement [the NGPA's priorities]": [89]

> Commentators in some of the rulemakings pursuant to section 401 of the NGPA have contended that

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[87] *Id.*

[88] The authorizing section for the entire NGA provides that the regulation "is necessary for the public interest." 15 U.S.C. § 717(a). No certificate can be obtained under the Act unless the Commission finds the proposed action "necessary or desirable in the public interest." 15 U.S.C. § 717f(a). Indeed, the certificate is one "of public convenience or necessity." *See also* note 62 *supra* (similar authority under PURPA).

[89] Notice of Proposed Rulemaking at 3, 44 Fed. Reg. 7740 (1979), J.A. 420. *See also* Notice of Proposed Rulemaking at 7, 44 Fed. Reg. 3053 (1979), J.A. 180 (preamble). *But see* Order No. 29, *supra* note 6, 44 Fed. Reg. 26857-58, J.A. 316-18 (decision to superimpose curtailments upon existing contractual relationships).

> the term "full food and fiber" requires the modification of existing curtailment plans to accommodate both new loads of existing customers as well as new customers. Other commentators have asserted that interpreting section 401 to include load growth would almost certainly require that the base period data of every affected plan be revised, in direct contravention of the instructions by Congress to avoid disruptive changes to the base periods of curtailment plans.[90]

The Commission's answer, in part, was to provide for load growth for agricultural and certain other high priority users through direct sales. FERC also intended to allow agricultural users capable of using alternate fuels to use direct sale gas instead.[91] Whether because it was thought necessary to achieve the NGPA's objectives, or otherwise, however, the direct sales program implemented by Order No. 27 operates entirely outside the framework of curtailment priorities.[92] Thus, when supplies are short, direct sales purchasers may not be affected when other pipeline customers will. Given this structure of the program, it was entirely reasonable for the Commission to adopt a limitation on the gas available for direct sales, at least until a clearer picture of supply patterns emerged following enactment of the NGPA.[93]

OCS gas was a natural choice for exclusion since to date it has been sold almost exclusively to interstate

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[90] Notice of Proposed Rulemaking at 4, 44 Fed. Reg. 7740 (1979), J.A. 421.

[91] *Id.* at 10, J.A. 427.

[92] *See* note 67 *supra*. *But see* Order No. 29, *supra* note 6, 44 Fed. Reg. 26857, J.A. 316 (curtailment system operates at direct sale customer's option).

[93] Order No. 27, *supra* note 60, 44 Fed. Reg. 24827, J.A. 456-58 (exclusion necessary to avoid disruption of OCS supply patterns).

pipelines.[94] Eligible users under the program should not be disserved by this limitation unless supplies of onshore gas are short when OCS gas is more abundant or unless they cannot for some other reason obtain access to onshore gas when they have or can obtain access to OCS gas. In such cases Order No. 27 permits an eligible user to apply for a waiver of the program's limitations.[95]

First Mississippi argues that a waiver would be impossible to obtain as a practical matter, first, because no producer would commit itself to sell in the face of a regulatory prohibition and, second, because as it reads the order no waiver will be granted without a commitment from the producer. FERC answers that Order No. 27 does not expressly require a signed commitment by the producer and that the details for securing a waiver remain to be fashioned.[96] We assume that the Commission will not require a formal commitment on the part of the seller before approving a waiver application under its direct sale program and that the program itself will

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[94] Because of the bifurcated price structure created by the NGA, interstate pipelines were unable to compete with intrastate ones for new sources of supply. Order No. 533, *supra* note 62, 40 Fed. Reg. 41763. Thus, the customers of interstate pipelines suffered the brunt of gas shortages. Direct sales were conceived of as a way to augment these customers' supplies. *Id.* However, such augmentation was not to have been at the expense of other interstate pipeline customers (or the entire curtailment structure would have been undermined); hence, sources of gas already dedicated to interstate commerce were excluded from it. This resulted in the exclusion of the bulk of OCS gas from the program in the first instance. *Id.* This exclusionary policy is presently being challenged in the Fifth Circuit. *See* note 75 *supra*.

[95] 18 C.F.R. 157.104(b), J.A. 472. *See also* Order No. 27, *supra* note 60, 44 Fed. Reg. 24828, J.A. 463 (summary of final rule).

[96] FERC Br. at 92; *see also* Order No. 27, *supra* note 60, 44 Fed. Reg. 24827, J.A. 456.

be employed to make reasonable adjustments within the framework of the Act.

Whether those high priority agricultural users eligible for participation in the direct sale program whose interests First Mississippi vigorously argues are not adequately or fairly served by Order No. 27 will in fact suffer the kinds of hardship which the NGPA or the NGA were designed to prevent cannot yet be determined but must await examination in light of the program's implementation and the administration of the NGPA.

Except in the respects it is here challenged we intimate no views on the propriety, reasonability or wisdom of the direct sale program implemented by Order No. 27. First Mississippi challenges the program only insofar as it excludes OCS gas and limits contract terms to five years. We find neither the OCS exclusion nor the five year limitation unlawful or unreasonable and accordingly affirm the Commission.

III. Procedural Challenges

A. *Environmental Impact Statement*

Process Gas Consumers Group (Process Gas) also attacks the final economic and environmental impact statement (FEEIS) filed by the Secretary of Agriculture, asserting it is deficient on four grounds. As the statement of those grounds will make evident, the attack is not on the adequacy of the FEEIS; rather, it is a backhand effort to obtain duplicative review of the USDA regulations in their allocation of natural gas, rather than in their impact on the environment.

USDA acknowledges that the National Environmental Protection Act (NEPA), 42 U.S.C. § 4332(2)(c), is applicable to the allocation regulations; an FEEIS was filed which USDA contends is adequate against the charges made by Process Gas. We agree.

Process Gas mounts four specific attacks on the regulations, under environmental grounds. Process Gas' brief states those grounds as follows:

> Four obvious alternatives were ignored. *First*, the FEEIS refused to consider the important alternative advocated by PGC. Under PGC's alternative, USDA would omit from its certification new agricultural uses and uses for which natural gas is not "necessary" (i.e., those agricultural uses which possess installed dual fuel capability). *This alternative would assume adherence to fixed base periods, and is the one which, PGC submits, is most consistent with Section 401.* Yet, by refusing even to consider it (or even one like it), the USDA is left without any idea of the relative impacts of such an approach on full food and fiber production, on other gas consumers, or on the public as a whole.
>
> *Second*, the FEEIS omitted the alternative of continued implementation of the USDA's Interim Rule. The USDA explained its decision to omit this obvious alternative by stating:
>
> > "It was recognized that alternative 4 and the Analysis Case [the Interim Rule] in the Draft EEIS would be realized only as a result of any action taken at the discretion of *FERC* and analysis of impacts of such action would be *speculative.* Therefore, these two options have been eliminated from any further consideration in the USDA Final EEIS." (FEEIS at 3 (AR. 2672) (emphasis added)).
>
> *Yet, the whole point of the impact analysis is to elucidate the relative costs and benefits of all alternatives, including those which are not adopted.* This is especially important here since USDA acted as the "lead agency" in preparing an EIS with respect to the implementation of Section 401, and other agencies, particularly the FERC, did not prepare one.

> *Third*, despite the clear indication *that Congress did not intend USDA to have authority to certify new uses or to cause revisions in base periods*, the USDA failed to consider any alternative under which base periods would be retained and the requirements of new agricultural uses would be omitted from the certification.
>
> *Fourth*, the *USDA failed to consider the alternative of retaining the status quo.* Although this "no action" alternative would require legislative action, *it would be important to establishing a "base case" for comparing and assessing the relative impacts of the lawful alternatives before the USDA.*

Process Gas Br. at 65-66 (textual emphasis generally added).

An initial examination of these allegations makes clear a threshold consideration: they relate to the basic issues presented in this case regarding *allocation* of gas supplies rather than environmental considerations. That is not an environmental question as such, although it has environmental aspects. Rather, it is a question which is resolved by recourse to the NGPA.

In its third contention Process Gas argues that USDA failed to consider the alternative of retaining the status quo. That is not accurate. USDA was not dealing with the environmental considerations from step one. Rather, there was a direct Congressional mandate to follow in formulating the regulations. As we have decided that the use of base periods was not required under the express command of the applicable statute, but rather use of current demand, as limited by contract or tariff provisions. We find nothing in the NGPA which requires the use of base periods to be rejected on environmental grounds.

The range of alternatives need not extend beyond these reasonably related to the purposes of the project. *Trout*

Unlimited v. Morton, 509 F.2d 1276, 1286 (9th Cir. 1974). The purpose of judicial review of an environmental impact statement is to require a "hard look" by the responsible agency at the alternatives to the project in light of the environmental consequences. *Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827, 839 (D.C. Cir. 1972). The nature of the environmental statement must also be assessed in the context of the federal action being taken. *Aberdeen & Rockfish R. Co. v. SCRAP*, 422 U.S. 289, 322 (1974). Judicial review must also be mindful of the Supreme Court's admonition that the "fundamental policy questions appropriately resolved in the Congress and in the state legislatures are *not* subject to reexamination in the federal courts under the guise of judicial review of agency action." *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 558 (1977) (emphasis in original). That same case emphasizes that the goals of NEPA essentially set out procedural mandates to the agencies. That mandate was met here.

B. Separate Implementation of Section 401(b)

Several petitioners[97] have challenged FERC's piecemeal implementation of the curtailment priorities for essential agricultural uses set forth in section 401 of the NGPA. At issue here is the Commission's decision to conduct separate rulemaking proceedings to implement section 401(b) of the NGPA. We find no error in the approach adopted by the Commission and accordingly reject this attack upon the rulemaking proceedings before us in this case.

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[97] The issue is raised by the Process Gas Consumers Group, *et al.* (Process Gas), the United Gas Pipeline Company (United), and the United Distribution Company, *et al.* (UDC).

Section 401(b) of the NGPA provides that the statutorily-mandated curtailment preference for essential agricultural uses will not apply "[i]f the Commission, in consultation with the Secretary of Agriculture, determines, by rule or order, that use of a fuel (other than natural gas) is economically practicable and that the fuel is reasonably available as an alternative for any agricultural use of natural gas." [98] Although the Commission originally proposed to define alternate fuel capability in a single rulemaking proceeding implementing other aspects of the new curtailment priorities set forth in section 401 of the NGPA,[99] the Commission decided when its final order was entered to consider and resolve the alternate fuel issues independently.[100] Accordingly, a new notice of proposed rulemaking concerning the NGPA's alternative fuel provision was published contemporaneously with FERC's final order concerning other aspects of section 401. Those separate proceedings have resulted in the issuance of an interim order,[101] effective January 1, 1980, as to which rehearing was denied February 19, 1980,[102] and are the subject of a separate petition for judicial review, currently pending in this court.[103]

Petitioners make a number of arguments with respect to the Commission's decision to carve implementation of the alternative fuel provision out of the rulemaking

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[98] 15 U.S.C. § 3391(b).

[99] FERC Notice of Proposed Rulemaking at 4-5, 44 Fed. Reg. 3052 (1979), J.A. 177-78.

[100] FERC Order No. 29-C, *supra* note 7, 44 Fed. Reg. 61339, J.A. 393-94.

[101] FERC Order No. 55, Interim Rule, 44 Fed. Reg. 62484 (1979).

[102] FERC Order No. 55-A, 44 Fed. Reg. 65585 (1979).

[103] Great Western Sugar Co. v. FERC, No. 79-2472 (D.C. Cir., filed Dec. 12, 1979).

challenged here.[104] The answer to all these arguments, however, is first, that the Commission had discretion under the NGPA to proceed as it did, even if having done so means that there was some interim period when "curtailed" agricultural uses were not reduced by alternate fuel capability; and second, that the Commission's discretion was exercised reasonably, adequate reasons having been given for the decision separately to consider alternate fuel capability.

As we understand the petitioners' contentions, the core issue is whether the NGPA effectively requires FERC

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[104] Process Gas makes three arguments. First, it contends that the decision to defer issuing regulations regarding alternate fuel capability was "arbitrary and capricious," Process Gas Br. at 62, because "neither Order No. 29 nor the Notice of Proposed Rulemaking . . . explained why a separate proceeding was necessary or why a finding as to alternate fuel capability must be deferred. . . ." *Id.* at 61. Secondly, it argues that the decision resulted in allocations being made contrary to the statutory priorities: ". . . agricultural uses with installed alternate fuel capability have been in a higher priority than industrial process and feedstock users which lack alternate fuel capability." *Id.* at 62-3. Finally, Process Gas contends that FERC took an unreasonably long time to issue the curtailment regulations, thereby "abus[ing] . . . its statutory discretion." *Id.* at 62.

United makes two arguments. First is the statutory argument made by Process Gas, that "implementation of Section 401 without regard to the alternate fuel capability test would be contrary to the statute." United Brief at 15. Alternatively, United argues that Order No. 29 "is tied to an erroneous standard for determination of alternate fuel capability." *Id.* at 17.

UDC argues that the interim rule, by "eliminating, without explanation, any reference to alternative fuel" was a clear violation of FERC's statutory mandate "to have such alternate fuel determinations made." UDC Br. at 62. Moreover, it contends, FERC's postponement of "hard issues," "thereby creating moving targets for parties to its proceedings," *id.* at 63, constitutes an abuse of discretion.

simultaneously to implement the curtailment preference for essential agricultural uses set forth in section 401(a) and the alternative fuel provision of section 401(b). For two related reasons we think it does not. First, by setting a 120-day deadline for DOE's rule under section 401(a),[105] Congress was clearly concerned that a new curtailment preference for essential agricultural uses be implemented promptly.[106] However, no comparable concern was expressed with respect to the alternate fuel provision[107] and a decision to proceed in piecemeal fashion is thus suported by the statutory structure.[108] Second, the mandatory language of section 401(a) contrasts with the more discretionary tone of section 401(b) and supports a determination that the implementation of section 401(a) be given priority. We do not mean to imply that the Commission was free to decline consideration of alternate fuel capability; Congress clearly intended that alternate fuel capability be considered.[109] Nor do we mean to imply that the Commission was free unreason-

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[105] *See* NGPA § 401(a), 15 U.S.C. § 3391(a).

[106] 123 Cong. Rec. H13,237 (daily ed. Oct. 14, 1978) (remarks of Rep. Ashley) ("specific target date").

[107] In fact, the conference report places so many limitations on the implementation of the provision that it is clear that overuse, rather than delayed implementation, of the provision was their chief concern. Conference Report, H.R. Rep. No. 1752, 95th Cong., 2d Sess. 114 (1978).

[108] FERC itself recognized at an early point that the statute established different priorities for implementation of its provisions. FERC Order Denying Rehearing of Interim Curtailment Rule at 12-13, 44 Fed. Reg. 37204 (1979), J.A. 260-61.

[109] Conference Report, H.R. Rep. No. 1752, 95th Cong., 2d Sess. 114 (1978) ("The Commission, in consultation with the Secretary of Agriculture, *will determine* if alternative fuels are economically practicable and reasonably available. . . .") (emphasis added).

ably to delay consideration of alternate fuel capability, but the delay in this instance was not unreasonable.

When its final order concerning other aspects of section 401's curtailment priorities was entered, the FERC referred to the contemporaneously issued notice of proposed rulemaking concerning alternate fuel [110] and when an order on rehearing was issued in the original proceedings, a more complete explanation of the decision to proceed separately was supplied: [111]

> It is the Commission's view that its obligations under the NGPA do not permit any further delay in the final implementation of section 401(a). That section is subject to a statutory deadline. Sections 401(b) and 402 are not. Congress clearly intended that implementation of section 401(a) should be given precedence if similarly expeditious implementation of sections 401(b) and 402 was not possible. Given the different data required for implementing those sections and the need to coordinate rulemaking among the Department of Agriculture (USDA), the Economic Regulatory Administration (ERA), and the Commission, the simultaneous implementation of

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[110] Order No. 29, *supra* note 6, 44 Fed. Reg. 26855, J.A. 305.

[111] Order No. 29-C, *supra* note 7, 44 Fed. Reg. 61338, J.A. 393. It would, of course, have been better had FERC stated its reasons more fully in the first instance. *See, e.g.*, North Slope Borough v. Andrus, 486 F. Supp. 332, 345 (D.D.C. 1979), *aff'd*, No. 78-1976 (D.C. Cir., Feb. 11, 1980) (NEPA requirement of reasoned environmental impact statement "designed to insure decisions are fully informed and well considered"). In the absence of prejudice to the parties, we can, however, look to subsequently issued orders to remedy that defect. *See, e.g.*, United States v. Benmar Transp. & Leasing Corp., 444 U.S. 4 (1979) (lack of statutorily required finding of consistency with "public interest and with the national transportation policy" in ICC order may be remedied in subsequent order).

> all sections of Title IV would be impossible without substantial delay of a final rule under section 401 (a).

In our view this explanation constitutes an adequate statement of reasons for the FERC's decision to proceed with the implementation of other aspects of section 401 while rulemaking continued under section 401(b). Nothing suggests, as one commenter implied,[112] that the Commission was deliberately "creating moving targets" [113] designed to confuse the public or to thwart review. The Commission had discretion to proceed as it did and we cannot say it exercised that discretion unreasonably. We accordingly reject this challenge to these rulemaking proceedings.[114]

CONCLUSION

While we thus generally affirm the agency actions in issue, we hold that the rule must be remanded to FERC insofar as it retains the use of a base-year method for high-priority uses and insofar as it denies high-priority status to plant protection gas used in operating plants.

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[112] Petitioner UDC.

[113] UDC Br. at 63.

[114] FERC also argues that this issue has become mooted by its issuance of Orders 55 and 55-A, implementing section 401(b) of the NGPA. However, these rules have no retroactive effect, and thus do not moot petitioners' challenge to the validity of the provision during the interim between the effectiveness of the two sets of orders. Nor do they moot the procedural questions raised by petitioners' challenge. *See* American Dairy of Evansville, Inc. v. Bergland, 627 F.2d 1252 (D.C. Cir. 1980). *Compare* Tennessee Gas Pipeline Co. v. FPC, 606 F.2d 1373, 1380-82 (D.C. Cir. 1979).

WALD, J., *Dissenting in Part*

I concur in the majority's conclusion that the rule challenged here must be remanded to the Commission for revision because it "in practice reverse[s] the statutory scheme of section 401" by favoring new users in the second priority classification over new users in the highest priority classification. However, I disagree with the majority opinion insofar as it adverts that the FERC must resolve this inequitable situation by according *both* high priority and essential agricultural users entitlement to volumes of natural gas sufficient to meet their current requirements. In my view, no legislative mandate requires the FERC to implement unchanged the Secretary of Agriculture's certification of agricultural users' gas needs; rather, I conclude that the NGPA leaves the FERC the discretion to utilize its expertise to fashion a curtailment rule that accommodates agricultural priority users "to the maximum extent possible" consistent with legislative intent, overall curtailment policies, and administrative practicalities.[1] It should be given the opportunity to utilize the full extent of this discretion on remand.

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[1] The resulting rule could utilize base year or current requirements entitlement schemes, a combination of both, if justified, or neither. The one set of proposed regulations noticed subsequent to the rule involved here suggests market mechanisms rather than curtailment plans may be the preferred method of reconciling the statutory goals. *See* Notice of Hearing & Public Comment on Proposed Rulemaking Concerning Review and Establishment of Natural Gas Curtailment Priorities for Interstate Pipelines, 45 Fed. Reg. 49087, 49091 (1980) (hereinafter *July 1980 Proposed Rulemaking*) ("Our studies indicate that a pricing system has the greatest potential of any alternative examined for achieving these benefits [of minimizing the costs of curtailment] since it provides a means to move gas to the industrial end users who value it most, while avoiding the costs associated with mandated shifts of supply").

I. The History of Curtailment

Since the advent of natural gas scarcities in the early seventies, regulated interstate pipelines have been required to establish elaborate curtailment plans detailing which of their customers will get how much gas in what priority in times of short supply. In Congress' own words:

> Curtailment plans establish priorities for the delivery of natural gas when supplies are insufficient to meet contract demand. In most cases, a local distribution company's entitlement to natural gas under a curtailment plan is determined by reference to the priorities of use, and volumes of gas used, by its customers during a particular base period.

H.R. Rep. No. 1750, 95th Cong., 2d Sess. 112-13 (1978), J.A. 39-40.

However, these plans often fall short of full effectiveness or equity because they cover only pipelines' direct customers. As we have decided today, the plans cannot assure that the ultimate users receive the benefit (or burden) of a statutory or FERC-ordered priority system unless they obtain their gas supply directly from an interstate pipeline. In general, local (non-interstate) distributors of natural gas allocate their supplies according to state law,[2] which may or may not correspond to the federal scheme. Moreover, many distributors have several sources of supply, enabling them to dispense non-federally regulated gas during times of shortage.[3]

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[2] Many states have utility commissions or statutes which mandate curtailment priorities for intrastate distributors.

[3] Local distributors very often rely on multiple supply sources to meet their retail demands; some also invest in gas storage facilities for peak periods; still others maintain synthetic natural gas facilities or propane-air plants or make arrangements to buy directly intrastate supplemental gas

Despite such problems, the FERC initially chose to develop curtailment plans allocating gas by end use rather than pro-rating contract entitlements. In pre-NGPA priority schedules, agricultural users were not accorded any special priority. As a result, two-thirds of the agricultural sector's 1977 interstate natural gas supply fell in the lowest, and most likely to be curtailed, priorities.[4] It was this situation which Congress sought to change by passage of the NGPA.

Once basic priorities were established, the FERC faced a further problem: how to decide how much gas is required by each priority class. In most cases, the FERC calculated the amount by reference to historical usage in a pre-curtailment year. Base period figures were adjusted for factors unique to particular pipelines, and particular years.[5] However, they did not normally take

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supplies. Additionally, many companies take gas from more than one interstate pipeline, which may be suffering varying degrees of curtailment. Thus, in times of shortage, local distribution companies may have gas which they are permitted or required to dispense according to different priorities than the federally prescribed ones. In this way they may be able to accommodate new as well as existing customers even though their curtailment share of the regulated pipeline's supply is based on a long gone base year.

[4] Final Economic and Environmental Impact Statement, U.S. Dept. of Agric., May 14, 1979 at 17 (Table 5), J.A. 946.

[5] Thus as PGC suggested in its comments on the USDA draft environmental impact statement, J.A. 865-67, "base periods can be adapted to meet fluctuating demands" through normalization of the base period figures if "the base year was abnormal," and the introduction of weather variables (*i.e.*, a "temperature sensitive factor" and a "wetness sensitive factor"). The volumes in the base periods of existing pipeline curtailment plans may reflect many factors unique to each pipeline (*e.g.*, gas supply and demand projections, certificate and contract obligations, technical and engineering capabilities, storage and peak shaving capabilities of distributor-

into account new or expanded uses of gas developed after the base year.

The base year approach has several advantages. It (1) permits predictability so that customers can plan ahead for shortage periods, (2) encourages conservation and (3) discourages irresponsible load growth by refusing to recognize new or expanded uses occurring after the base year during curtailment. Although this court has indicated that the base year concept must be intelligently applied in individual cases to ensure that it does not indiscriminately utilize stale data to bring about a result at odds with the overall priorities accorded current end users, it has never ruled use of a base year illegal *per se*. *See North Carolina v. FERC*, 584 F.2d 1003 (D.C. Cir. 1978);[6] *Southern California Edison Co. v. FPC*, 524 F.2d 409 (D.C. Cir. 1975); *Rhode Island Consumers' Council v. FPC*, 504 F.2d 203 (D.C. Cir. 1974). And, although post-base year customers must be served during curtailment periods through use of supplementary "self-help" sources, *see* note 3 *supra*, this feature does not create insurmountable problems. As petitioners point out, agricultural production expanded 40% between 1974-1979 even when it had no statutory priority and had to be accommodated chiefly through such means. Even now, the government suggests "self-help" gas answers the needs of new load-growth among the highest priority residential users.[7]

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customers, end use and weather). For example, on Panhandle Eastern Pipe Line Company's system, a 12-month *pro forma* year is used as the base period. The data for this base period reflect the *highest* monthly use over a 30-month period during which there was no curtailment.

[6] "[D]iscrimination resulting from an end-use plan can be justified only to the extent that the plan actually does protect the high priority uses from curtailment ahead of low priority uses." North Carolina v. FERC, *supra*, 584 F.2d at 1010.

[7] *See July 1980 Proposed Rulemaking* at 49095.

In the past, the Commission rejected the "current requirements" method of computing allocations because of its administrative complexity and unpredictability, as well as its unfortunate tendency to encourage distributors to recruit new priority users during shortages.[8] Nonetheless, the Secretary of Agriculture now claims that only the current requirements method is "sufficiently flexible and responsive to provide for natural gas requirements necessary for full food and fiber production in all instances."[9] The problem in this case arises, however, not so much from the Secretary's position *qua* certification, as from the FERC's unquestioning acceptance of this certification for implementation purposes and its concomitant disclaimer of any power to make offsetting changes or accommodations necessary to insure that the overall curtailment plan works effectively and is in line with Congressional objectives.[10] The resultant disparity between treatment of load-growth in the top three priority classes will almost certainly have substantial, unpredictable and, I am convinced, largely unintended effects on the national consumption patterns for natural gas.[11]

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[8] *See July 1980 Proposed Rulemaking* at 49097; Recent Decisions, 47 Geo. Wash. L. Rev. 829, 842 (1978). Among the identified problems with a "current requirements" standard are: choosing a method and frequency for determining "current requirements"; determining the credibility of estimates prepared by distributors who know that their pipeline supply is a function of those estimates; and the effect of fluctuation in "current requirements" on industry and administrative planning.

[9] Final Rule, 44 Fed. Reg. 28782, 28785 (May 1979); J.A. 163.

[10] *See* Order No. 29, 44 Fed. Reg. 26855, 26857 (May 2, 1979), J.A. 315-16.

[11] Under the final rule, distributors will receive an allocation computed from a base year profile for all priorities ex-

II. THE ISSUE

Section 401(a) of the NGPA requires the Secretary of Energy to prescribe, within 120 days of enactment, a rule that provides "to the maximum extent practicable"

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cept agricultural uses, which will be computed (within contract levels) according to current requirements. Ballooning agricultural uses could thus cut off both the supply to lower priority users and to new users of higher priority users. In fact, in times of shortage, distributors serving primarily agricultural users may receive a higher percentage of their normal supply than distributors serving primarily customers in the highest priority class.

One of the petitioners cites an example of the gross discrimination that could result as follows:

	Distributor A (Farm Belt)	Distributor B (City)
Contract	100,000 dts	100,000 dts
Base Period High Priority Users Volumes	25,000	50,000
Base Period Agricultural Uses Volumes	25,000	0
Post Base Period High Priority Market	0	50,000
Post Base Period Agricultural Market	50,000	0

Assuming that only 150,000 Dt of gas were available for both distributors, Distributor A would, under the Commission's rule, acquire volumes for its post base period agricultural market up to its contract with the pipelines. Here it would receive the full 50,000 dts. Distributor B's post base period high priority market would receive not one dt because its high priority users would be limited to their base period volumes. In essence, gas would be taken away from high priority markets and given to a Congressionally dictated *lower* priority.

Application of Consolidated Edison Company for Rehearing, FERC Docket No. RM 79-15, J.A. 1638.

that interstate pipeline curtailment plans not curtail gas deliveries to "essential agricultural users" below the amount certified by the Secretary of Agriculture as necessary to meet the "requirements" of such users, unless a reduction is "necessary in order to meet the requirements of high priority users." [12] Section 401(c) in turn requires the Secretary of Agriculture to certify to the Secretary of Energy and the FERC the "natural gas requirements (expressed as volumes or percentages of use) for essential agricultural uses" that are necessary to achieve "full food and fiber production."

The FERC argues that these subsections of 401, when read together, leave it no option but to implement the whole of the Secretary of Agriculture's certification of need, regardless of whether that certification is based on current requirements estimates or, as are other priority categories, on base year calculations. It therefore has refused to pass on the wisdom or necessity of the Secretary of Agriculture's adoption of a current requirements entitlement scheme.[13]

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[12] Section 401(f) of the NGPA, 15 U.S.C. § 3391(f), defines high priority users as:

> (2) HIGH-PRIORITY USER.—The term "high-priority user" means any person who—
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> (A) uses natural gas in a residence;
>
> (B) uses natural gas in a commercial establishment in amounts of less than 50 Mcf on a peak day;
>
> (C) uses natural gas in any school, hospital, or similar institution; or
>
> (D) uses natural gas in any other use the curtailment of which the Secretary of Energy determines would endanger life, health, or maintenance of physical property.

[13] However, in its initial and interim rule proposals, the FERC took a broader view of its statutory authority and

The petitioners, however, point to the language of section 403 of the NGPA, 15 U.S.C. § 3393, which provides that "the Commission shall implement the rules . . . *pursuant to its authority under the Department of Energy Organization Act to establish, review, and enforce curtailments under the Natural Gas Act.*" (Emphasis supplied). They argue that this language preserves the Commission's traditional broad authority to implement curtailment priorities and policies, and that its failure to exercise that authority in this instance has resulted in an unfair and unworkable rule which violates rather than advances Congressional intent.

Indeed, the majority has accepted part of petitioner's argument; it finds the rule as it stands incomprehensible and unworkable. However, it would apparently remand only to allow the FERC to change its base year curtailment rule for high priority users to provide for load-growth in order to bring about some kind of parity with new agricultural users. In my view, this approach does not go far enough in recognizing the FERC's authority under section 403 of the NGPA to fashion curtailment rules for all priority (and non-priority) classes that will operate fairly and efficiently in accord with the NGPA's priority scheme. Though the language in sections 401 and 403 delegating authority to the various agencies is admittedly ambiguous and hard to follow, the accompanying legislative history makes clear that the FERC has been delegated the ultimate power *and responsibility* to accommodate the Secretary of Agriculture's certification to the overall statutory priority scheme, and to the Congressional directive that there be minimum disruption to pre-existing curtailment plans.

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proposed to compute the "requirements for essential agricultural uses" on a base year period. *See* Notice of Proposed Rulemaking, 44 Fed. Reg. 3052, 3053-54 (Jan. 10, 1974), J.A. 184; Notice of Proposed Rulemaking, 44 Fed. Reg. 3725, 3727 (Jan. 12, 1979), J.A. 270-71.

of Agriculture's certification could include extended production capacities or new facilities only if determined by the Secretary to be necessary to meet national food and fiber production and to preserve health, safety or welfare.[17] Moreover, this amendment provided that the Secretary of Agriculture was to determine the essential agricultural uses while the FERC would determine the volumes necessary to meet those uses. The phrase "full food and fiber production" was later substituted for "national food and fiber production" in an apparent effort to insure that the "full cyclical process of raising or preparing food for market" was included in designated essential agricultural uses.[18]

At this juncture, then, the amendment gave the Secretary of Agriculture no power at all to certify amounts or *volumes* but only the *uses* essential to food and fiber production. The amounts necessary to meet those uses were to be fixed by the FERC, presumably in accommodation with all other aspects of pipelines' curtailment plans, including the needs of other statutorily mandated priorities.

As finally passed by the Senate, however, the "agricultural use" curtailment amendment applied only to interstate pipelines[19] and although it delegated to the Secre-

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[17] 123 Cong. Rec. S15160 (daily ed. Sept. 19, 1977).

[18] *See* 123 Cong. Rec. S15772 (daily ed. Sept. 17, 1977) (remarks of Sen. Ford) ("It is our intention that all activities encompassed within the term 'food processing' should be eligible for priority consideration"); *cf.* 124 Cong. Rec. S14957 (daily ed. Sept. 12, 1978) (remarks of Sen. Talmadge) ("The definition of essential uses in agriculture should be interpreted in the broadest possible concept so that our food and fiber production continues without impairment").

[19] Senators Pearson and Bentsen had proposed an amendment to the Senate bill on September 16, 1977, which provided for an agricultural priority. When explaining their

tary of Agriculture the power to certify amounts as well as uses, it made provision for "present and expanded capacity" in existing and future plants for only two uses, raw material feedstock or process fuel and production of fertilizer and essential agricultural chemicals. Other essential agricultural uses apparently were not to be permitted such "load growth." As in the final version of section 401, there was no reference to the method to be used to certify "requirements" for agricultural uses, or any indication that it should be different from that currently used to determine the "requirements" of other priority classifications protected by the statute.

The House-passed counterpart was a different animal altogether because it attempted to regulate the curtailment priorities of interstate *and* intrastate pipelines *and* local distribution companies. The Secretary of Agricul-

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amendment, Senator Pearson remarked of the curtailment scheme:

> The intent of this section is to specify by statutory language those categories of service to receive natural gas in order of priority pursuant to Federal curtailment plans. New section 25 does not expand the statutory scope as judicially construed, of current curtailment authority....

123 Cong. Rec. S15099 (daily ed. Sept. 16, 1977). Senators Ford and Jackson then proposed their amendment to the bill which would have included local distribution companies within the coverage of curtailment plans. 123 Cong. Rec. S15159 (daily ed. Sept. 19, 1977). Senator Jackson later proposed a further amendment dealing with agricultural priorities identical in language to the earlier Pearson-Bentsen amendment. 123 Cong. Rec. S15771 (daily ed. Sept. 27, 1977). On October 4, 1977, the day the bill passed the Senate, Senators Pearson and Bentsen submitted a revised amendment, as a substitute for their earlier amendment, which reiterated their earlier limitation on the scope of curtailment plans. This amendment was then adopted, and became an integral part of the Senate's energy package. 123 Cong. Rec. S16323-25 (daily ed. Oct. 4, 1977).

ture was to identify essential uses and determine the "supply requirements including requirements from capacity extensions" needed "to satisfy the requirements of full food and fiber production and processing." In the context of the House bill, a certification of current requirements made administrative sense since the curtailment plan could be imposed to effect priorities at the burner tip level by application to local distribution companies as well as intrastate and interstate pipelines.

The Conference Committee, however, adopted the more limited Senate provision "with certain modifications." Curtailment priorities applied only to interstate pipelines, not to local distribution companies. There was no express authorization for new or expanded agricultural uses or any reference to "load growth" in the statute itself. As to the Secretary's certifying power the Report said only:

> The conference agreement gives authority to the Secretary of Agriculture to *certify* to the Secretary of Energy and to the Commission *the natural gas requirements for agricultural uses* in order to meet the requirements of full food and fiber production, based upon the definition of "agricultural use" contained in this section.

(Emphasis supplied).[20] The Report was silent on the subject of what FERC must do with the certification, referring in general terms to the Secretary of Energy's responsibility for adjusting, according to the statutory plan, the "*schedule* of curtailment priorities."[21]

Moreover, the Report stressed, repeatedly and emphatically, that Congress did not wish to open up existing curtailment plans, particularly base year calculations, any more than was absolutely necessary.

> Once the schedule of curtailment priorities is brought into conformity with the requirements of

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[20] H.R. Rep. No. 1752, 95th Cong., 2d Sess. 114 (1978).

[21] *Id.* at 113 (emphasis supplied).

> this Act, *the Commission will be required to implement the revised curtailment priority schedule applicable to interstate pipelines.* For purposes of implementing this section, the Commission *is instructed to reopen curtailment plans* that are already *in effect under the Natural Gas Act only to the extent necessary to adjust those plans to bring them into conformity with the new curtailment priority schedule.* The conferees were concerned that these changes not burden the Commission with lengthy proceedings which might throw existing curtailment plans into disarray. Therefore, the conference agreement includes the term "to the maximum extent practicable" to assure that the Commission has the necessary flexibility in implementing any changes. For example, the conferees do *not* intend the *reopening of curtailment plans for this limited purpose to result in adoption of a new base year for curtailment purposes.*

(Emphasis supplied).[22] Contrary to the majority opinion's finding of an "absence of any . . . precise indication from Congress," maj. op. at 37, it is hard to think of a clearer Congressional signal that the FERC had discretion to allocate scarce gas to the newly established priority classes under the base year system it had traditionally used.

So far as I can see, then, there is nothing in the text or legislative history of the Act to suggest that section 401 was meant to strip the FERC of its traditional powers to balance needs and make the myriads of ac-

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[22] *Id.* at 113. *See also* 124 Cong. Rec. S15431 (daily ed. Sept. 19, 1978) (remarks of Sen. Melcher) (the FERC "explain[s] in their assessment that 'that will require a limited reopening of the existing curtailment cases before the Commission for the purpose of establishing the entitlements' "); H.R. Rep. 1750, 95th Cong., 2d Sess. 112-113 (1978) (PURPA-Title II) ("the revisions required in title IV of the Natural Gas Policy Act of 1978 . . . do[] not require an updating of the base period data"), J.A. 40. If updating is required, PURPA's specific requirement of computation or conservation comes into effect.

commodations necessary for a coherent curtailment implementation scheme. The most logical interpretation of the relationship between the FERC and the Secretaries of Agriculture and Energy is that the Secretary of Agriculture would designate the essential uses and the percentages or volumetric quantities necessary for "full food and fiber production," the Secretary of Energy would incorporate those uses into his "priority schedule" rule, and then the FERC would proceed to "implement" that rule, *i.e.*, accommodate the volume or percentage certifications with other priorities and general curtailment policies required under the Natural Gas Act. Given the fact that Congress knew—and had indeed decided for itself—that only deliveries to pipelines, not burner tip users, were to be regulated by the federal curtailment scheme, there is no reason to believe—and nothing in the legislative history to indicate—that the Commission could not treat the Secretary's essential agricultural uses certification as it does estimates of needs of other priorities.[23]

In short, I believe that Congress, well aware of the varied and complex issues associated with the curtailment process,[24] meant to keep the FERC's power "to implement" curtailment priority rules intact, although assigning to another agency the power to define a user

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[23] In American Smelting & Refining Co. v. FPC, 494 F.2d 925 (D.C. Cir.), *cert. denied*, 419 U.S. 882 (1974), we remanded to the Commission for reconsideration an order using a different standard for computing curtailment allocations for one group of customers than for another.

[24] I am puzzled by the majority opinion's reference to the "mammoth assessment of historical usage" involved in use of the base year method, maj. op. at 41. Quite the opposite is true—the base year allocations are already in place in individual pipeline curtailment plans and would remain generally static whereas the administrative complications of keeping up with constantly fluctuating and expanding "current requirements" are truly mind staggering.

class with a specified placement in the priority hierarchy and quantify its needs. If, as a result of the rule before us, Title IV of the NGPA is interpreted otherwise, *i.e.*, to lay down one aberrational and inflexible method of allocation for all priority classes, regardless of other considerations, the flexibility of the FERC "to administer curtailments" will have been gravely and unwisely, and I believe unnecessarily, limited. I therefore dissent from approval of the FERC's refusal to utilize its much needed "expertise" to resolve this complex curtailment problem.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-1336

THE PROCESS GAS CONSUMERS GROUP, ET AL., PETITIONERS

v.

U.S. DEPARTMENT OF AGRICULTURE,
BOB BERGLAND, SECRETARY OF AGRICULTURE, RESPONDENTS

UNITED GAS PIPE LINE COMPANY,
THE BROOKLYN UNION GAS COMPANY,
THE AMERICAN BAKERS ASSOCIATION,
THE FERTILIZER INSTITUTE,
AMERICAN SEED TRADE ASSOCIATION, INC.,
AIR PRODUCTS AND CHEMICALS, INC., ET AL.,
THE UNITED STATES BREWERS ASSOC., INC.,
ATLANTA GAS LIGHT COMPANY,
THE RETAIL BAKERS OF AMERICA,
MISSISSIPPI RIVER TRANSMISSION CORP.,
HIGH PLAINS GAS CONSUMER GROUP,
THE AMERICAN TEXTILE MANUFACTURERS INSTITUTE, INC.,
THE DISTILLED SPIRITS COUNCIL OF THE
UNITED STATES, INC.,
COLUMBIA NITROGEN CORP., AND NIPRO, INC.,
NATIONAL COUNCIL OF FARMER COOPERATIVES,
PACIFIC GAS & ELECTRIC CO.,
THE GREAT WESTERN SUGAR CO.,
TENNESSEE GAS PIPELINE CO.,
TRANSCONTINENTAL GAS PIPE LINE CORP.,

KANSAS-NEBRASKA NATURAL GAS CO., INC.,
ELI LILLY AND COMPANY,
PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
NATIONAL INDEPENDENT MEAT PACKERS ASSOCIATION,
NATIONAL SOYBEAN PROCESSORS ASSOCIATION,
INTERVENORS

No. 79-1713

UNITED GAS PIPE LINE COMPANY, PETITIONER

v.

U.S. DEPARTMENT OF AGRICULTURE,
BOB BERGLAND, SECRETARY OF AGRICULTURE, RESPONDENTS

TRANSCONTINENTAL GAS PIPE LINE CORPORATION,
THE PROCESS GAS CONSUMERS GROUP, ET AL.,
THE DISTILLED SPIRITS COUNCIL OF THE
UNITED STATES, INC.,
FIRST MISSISSIPPI CORPORATION,
ELI LILLY & COMPANY,
THE UNITED STATES BREWERS ASSOCIATION, INC.,
PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
AMERICAN PAPER INSTITUTE, INC.,
UNITED DISTRIBUTION COMPANIES, INTERVENORS

Petitions for Review of Orders of the
U.S. Department of Agriculture

No. 79-1449

THE PROCESS GAS CONSUMERS GROUP, ET AL., PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION, RESPONDENT

AMERICAN BAKERS ASSOCIATION,
STATE OF TEXAS,

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
AMERICAN TEXTILE MANUFACTURERS INSTITUTE, INC.,
NATIONAL COUNCIL OF FARMERS COOPERATIVES,
NATIONAL FOOD PROCESSORS ASSOCIATION,
EAST TENNESSEE NATURAL GAS COMPANY, ET AL.,
AMERICAN SUGAR CANE LEAGUE OF THE USA, INC.,
PUBLIC SERVICE ELECTRIC AND GAS COMPANY,
UNITED DISTRIBUTION COMPANIES,
CONSOLIDATED EDISON COMPANY OF NEW YORK,
MISSISSIPPI RIVER TRANSMISSION CORPORATION,
SOUTHERN CALIFORNIA GAS COMPANY,
GLASS PACKAGING INSTITUTE,
PUBLIC SERVICE COMPANY OF NORTH CAROLINA, INC. AND
NORTH CAROLINA NATURAL GAS CORPORATION,
ARMOUR & COMPANY,
ALABAMA GAS CORPORATION,
PUBLIC SERVICE COMMISSION OF NEW YORK,
BROOKLYN UNION GAS COMPANY,
STATE OF OKLAHOMA,
CONSOLIDATED GAS SUPPLY CORPORATION,
HIGH PLAINS GAS CONSUMER CORPORATION,
DISCUS,
BISCUIT & CRACKER MANUFACTURING ASSOCIATION,
AIR PRODUCTS & CHEMICALS, INC.,
FERTILIZER INSTITUTE,
AMERICAN SEED TRADE ASSOCIATION, INC.,
GREAT WESTERN SUGAR COMPANY,
TRANSCONTINENTAL GAS PIPE LINE CORPORATION,
UNITED GAS PIPE LINE COMPANY,
KANSAS-NEBRASKA NATURAL GAS COMPANY,
TENNESSEE GAS PIPELINE COMPANY,
ELI LILLY & COMPANY,
TERA CHEMICALS INTERNATIONAL, INC.,
UNITED STATES BREWERS ASSOCIATION,
FARMLAND INDUSTRIES, INC.,
NATIONAL INDEPENDENT MEAT PACKERS ASSOCIATION,
SOUTHERN NATURAL GAS COMPANY,
NATIONAL SOYBEAN PROCESSORS ASSOCIATION.

PROCESS GAS CONSUMERS GROUP,
AMERICAN MEAT INSTITUTE,
ENTEX, INC.,
NEW JERSEY NATURAL GAS COMPANY,
WASHINGTON GAS LIGHT COMPANY,
ALLIED CHEMICAL CORPORATION,
TENNESSEE GAS PIPELINE COMPANY,
BROOKLYN UNION GAS COMPANY,
AMERICAN MEAT INSTITUTE,
AMERICAN GAS ASSOCIATION, INTERVENORS

No. 79-1511

COLUMBIA GAS TRANSMISSION CORPORATION, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, RESPONDENT

UNITED DISTRIBUTION COMPANIES,
THE UNITED STATES BREWERS ASSOCIATION, INC.,
PUBLIC SERVICE COMMISSION OF NEW YORK,
CONSOLIDATED GAS SUPPLY CORPORATION,
GREAT WESTERN SUGAR COMPANY,
TENNESSEE GAS PIPELINE CO., INTERVENORS

No. 79-1534

UNITED DISTRIBUTION COMPANIES, PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION, RESPONDENT

CONSOLIDATED GAS SUPPLY CORPORATION, INTERVENOR

No. 79-1557

UNITED DISTRIBUTION COMPANIES, PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION, RESPONDENT

No. 79-1568

THE BROOKLYN UNION GAS COMPANY, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, RESPONDENT

PUBLIC SERVICE COMMISSION OF NEW YORK, INTERVENOR

No. 79-1569

STATE OF LOUISIANA, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, RESPONDENT

No. 79-1585

COLUMBIA NITROGEN CORPORATION AND

NIPRO, INC., PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION, RESPONDENT

No. 79-1610

FIRST MISSISSIPPI CORPORATION, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, RESPONDENT

No. 79-1617

ATLANTA GAS LIGHT COMPANY, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, RESPONDENT

No. 79-1655

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, RESPONDENT

No. 79-1765

FIRST MISSISSIPPI CORPORATION, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, RESPONDENT

No. 79-1813

UNITED GAS PIPE LINE COMPANY, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, RESPONDENT

No. 79-2259

THE PROCESS GAS CONSUMERS GROUP, AMERICAN INDUSTRIAL CLAY COMPANY OF SANDERSVILLE AND GEORGIA KAOLIN COMPANY, PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION, RESPONDENT

No. 79-2273

ALLIED CHEMICAL CORPORATION, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, RESPONDENT

No. 79-2297

STATE OF LOUISIANA, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, RESPONDENT

No. 79-2314

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, RESPONDENT

No. 79-2323

THE FERTILIZER INSTITUTE, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, RESPONDENT

No. 79-2352

COLUMBIA GAS TRANSMISSION CORPORATION, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, RESPONDENT

No. 79-2361

THE BROOKLYN UNION GAS COMPANY, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, RESPONDENT

No. 79-2368

UNITED DISTRIBUTION COMPANIES, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, RESPONDENT

No. 79-2369

NATIONAL FOOD PROCESSORS ASSOCIATION, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, RESPONDENT

No. 79-2435

ATLANTA GAS LIGHT COMPANY, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, RESPONDENT

Petitions for Review of Orders of the
Federal Energy Regulatory Commission

Argued En Banc April 13, 1982

Decided October 1, 1982

Judgment entered this date

Jerome M. Feit, Solicitor, Federal Energy Regulatory Commission with whom *George H. Williams, Jr.*, Attorney, Federal Energy Regulatory Commission was on the rehearing brief on Section II.A for respondents.

Edward J. Grenier, Jr., *Richard P. Nolan*, *Robert W. Clark, III*, and *William H. Penniman* for the Process Gas Consumers Group, *C. William Cooper*, *Richard M. Merriman*, and *John R. Schaefgen, Jr.* for United Distribution Companies, *Lewis Carroll* and *Gordon Grant* for

Washington Gas Light Company, *Joseph P. Stevens* and *Alvin Adelman* for the Brooklyn Union Gas Company and *Richard A. Solomon* for The Public Service Commission of the State of New York were on the rehearing brief on Section II.A for petitioners.

Steven A. Herman for American Bakers Association and The Fertilizer Institute with whom *William A. Mogel* for American Meat Institute, et al., *Joseph M. Creed* for Biscuit & Cracker Manufacturers' Association, *Joseph S. Fontana* for Corn Refiners Association, *Albert J. Feigen* for American Sugar Cane League of the U.S.A., Inc., *Richard S. Harrell* for Distilled Spirits Council of the U.S., Inc., *Margaret M. Huff* and *Michael J. Huston* for Eli Lilly Company, *Gerard Paul Panaro* for Retail Bakers of America, *James W. Riddell* for U.S. Brewers Association, Inc., *Keith R. McCrea* for Glass Packaging Institute, *Donald A. Frederick* for National Council of Farmers Cooperative, *Edwin H. Peivett* and *Michael J. Ruane* for National Meat Association, and *Frederic G. Berner, Jr.* for National Soybean Processors Association were on the joint rehearing brief on Section II.A for Agriculture intervenors.

Anthony J. Steinmeyer and *Bruce G. Forrest*, Attorneys, Department of Justice and *Terrence G. Jackson*, Attorney, Department of Agriculture were on the rehearing brief on Section II.A for respondent, U.S. Department of Agriculture.

Gregory Grady with whom *Michael J. McDonald*, *Nicholas W. Fels*, *K. Gregory Tucker*, *Thomas E. Midyett, Jr.*, *A.S. Lacy*, and *Roy R. Robertson, Jr.*, were on the joint rehearing brief on Section II.A for petitioners, Midwestern Gas Transmission Company, et al.

John E. Holtzinger, Jr., *Paul H. Keck*, *John T. Stough, Jr.*, and *Brian R. Gish* for Atlanta Gas Light Company and *William I. Harkaway* and *G. Douglas Essy* for Consolidated Edison Company of New York, Inc. were on the joint rehearing brief on Section II.A for respondents.

David B. Robinson and *James R. Patton, Jr.* for the State of Louisiana, *Nicholas W. Fels* for Air Products and Chemicals, Inc., et al., and *Michael J. Manning* for Entex were on the joint rehearing brief on Section I.C for petitioners.

D. Knox Bemis with whom *W. DeVier Pierson, Richard A. Yarmey* and *Sheila Jackson Lee* were on the rehearing brief on Section I.C for petitioners, United Gas Pipe Line Company.

Joel M. Cockrell, Attorney, Federal Energy Regulatory Commission with whom *Jerome M. Feit*, Solicitor, and *George H. Williams, Jr.*, Attorney, Federal Energy Regulatory Commission were on the rehearing brief on Section I.C for respondent.

Joseph P. Stevens and *Alvin Adelman* for The Brooklyn Union Gas Company, *Richard A. Solomon* and *David D'Alessandro* for the Public Service Commission of the State of New York, Inc., and *Lewis Carroll* and *Gordon M. Grant* for Washington Gas Light Company were on the joint rehearing brief on Section I.C for respondents.

Before: ROBINSON, *Chief Judge*; WILKEY, WALD, MIKVA, EDWARDS, and GINSBERG, *Circuit Judges*; and ROBB, *Senior Circuit Judge*.*

Opinion for the Court filed by *Circuit Judge* WALD.

WALD, *Circuit Judge*: We granted rehearing *en banc*** in this case to determine whether the Federal Energy Regulatory Commission ("FERC" or "Commission")[1] im-

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* Sitting by designation and assignment pursuant to 28 U.S.C. § 294(c) and the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, § 205, 96 Stat. 25, 58.

** This court's order of November 13, 1981 granting rehearing *en banc* is reprinted as an Appendix to this opinion.

[1] Pursuant to the Department of Energy Organization Act, Pub. L. No. 95-91, 91 Stat. 565 (1977) (codified at 42 U.S.C. § 7101 *et seq.*), FERC took over the Federal Power Commission's ("FPC") authority to supervise curtailment plans. This opinion refers to both the FPC and FERC as "the Commission."

properly construed its authority under sections 401 and 403 of the Natural Gas Policy Act of 1978 ("NGPA") [2] with respect to integrating priority treatment for essential agricultural uses into ongoing curtailment plans.[3] Under the NGPA, the Secretary of Agriculture ("Secretary") is instructed to certify amounts of natural gas required to supply "essential agricultural uses" [4] so as to

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[2] Pub. L. No. 95-621, 92 Stat. 3350 §§ 401, 403 (1978) (codified at 15 U.S.C. §§ 3391, 3393).

[3] In granting rehearing *en banc*, this court vacated Parts I.C and II.A of the panel opinion. Because the petitions for rehearing did not challenge Part II.A.1 of the panel opinion, we issued an order on January 22, 1982 instructing the parties not to brief that issue and we hereby reinstate Part II.A.1 of the panel opinion. Following briefing and oral argument on the remaining issues, the court has decided to adopt Part I.C of the panel opinion as the opinion of the *en banc* court. Thus, we adopt the panel's view that the Commission's specific grants of authority under sections 401, 402, 501 and 502 of the NGPA control over the general requirements of sections 4 and 5 of the Natural Gas Act, 15 U.S.C. §§ 717c, 717d. In doing so, we accept the Commission's position that section 502(c) of the NGPA, 15 U.S.C. § 3412, is an appropriate mechanism for correcting any inequities in specific plans that follow from application of its generic rule. By its terms, section 502(c) allows for adjustments "as may be necessary to prevent special hardship, *inequity, or an unfair distribution of burdens*," 15 U.S.C. § 3412 (emphasis added), and the Commission assures us that such adjustments have been granted promptly. *See* Brief for FERC on Petitions for Rehearing En Banc of Section "I-C" of the Court's July 29, 1981 Opinion at 25 n.16. Absent a ripe case or controversy regarding the application of section 502(c), however, we refrain from expressing an opinion as to whether our decision in North Carolina v. FERC, 584 F.2d 1003, 1012-15 (D.C. Cir. 1978) delineates the scope of the Commission's authority in a section 502(c) proceeding.

[4] Essential agricultural use is defined as any use of natural gas:

> (A) for agricultural production, natural fiber production, natural fiber processing, food processing, food quality maintenance, irrigation pumping, crop drying, or
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> (B) as a process fuel or feedstock in the production of fertilizer, agricultural chemicals, animal feed, or food,

meet "full food and fiber production."[5] The Commission is then instructed to implement the Secretary's certification by assuring that "to the maximum extent practicable" essential agricultural use requirements will not be curtailed unless doing so is necessary to meet the needs of the highest priority users: residential customers, small commercial establishments, schools, hospitals and other users for whom curtailment might be life threatening or might endanger physical property.[6] In this case, the Commission ruled that its implementation authority under the NGPA is not sufficiently broad to allow it to limit implementation of certified essential agricultural requirements to those requirements reflected in "base-year" curtailment plans.[7] Because we conclude that the Commission failed to exercise its authority to determine whether any modification to full implementation is appropriate to protect the interests of high priority users, and has therefore allowed an apparent reversal of statutory priorities to be carried out by *default* rather than by any considered analysis of

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which the Secretary of Agriculture determines is necessary for full food and fiber production. 15 U.S.C. § 3391(f).

[5] *Id.* § 3391(c).

[6] This responsibility derives from section 401(a) of the NGPA, 15 U.S.C. § 3391(a). Under 401(a), the Secretary of Energy is instructed, under a 120 day deadline, to fashion a rule providing that "to the maximum extent practicable" essential agricultural users will not be curtailed unless doing so is necessary to protect high priority users. The Secretary's rule, which adopts the language of 401(a) almost verbatim, *see* note 35 *infra*, is then to be implemented by the Commission under section 403 of the NGPA, 15 U.S.C. § 3393. The question before us is whether the Commission read its rulemaking powers under section 403, and consequently the substantive standards of section 401, too narrowly.

[7] A "base-year" curtailment plan allocates natural gas according to amounts consumed during a particular historical period. *See* notes 16-20 and accompanying text *infra*.

curtailment policy, we reverse and remand this aspect of the Commission's decision.

I. Background

Prior to passage of the NGPA, the Commission reviewed natural gas curtailment plans pursuant to its broad authority to regulate the interstate transportation of natural gas.[8] Early on in the development of such plans, the Commission expressed a preference for "end-use" plans—that is, plans that would distribute natural gas according to the needs of the ultimate consumer.[9] Residential consumers, for whom temporary curtailments could be life threatening, were given highest priority. Those for whom curtailment was considered to pose the least hardship—customers with "interruptible" contracts and those who used natural gas as a boiler fuel—were given lowest priority. Since curtailment plans only covered direct customers of interstate pipelines, there was no assurance that natural gas allotted to a distributor based on the high priority status of his customers would actually reach the preferred end-users.[10] Nonetheless, the Commission stood by its position that end use plans would most equitably distribute natural gas. By the time the NGPA

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[8] *See* FPC v. Louisiana Power & Light Co., 406 U.S. 621, 640-41 (1972).

[9] The Commission explained this system of preferences in a pair of policy statements. *See* Order No. 467, 49 F.P.C. 85, 87-88 (1973); Order No. 467-B, 49 F.P.C. 583, 587-88 (1973).

[10] In general, local distribution of natural gas is controlled by state utility commissions that may have their own rules for intrastate distribution. The Commission has not asserted authority over these local distributors, nor has Congress required it to assert such authority. *See* Elizabethtown Gas Co. v. FERC, 636 F.2d 1328, 1332 (D.C. Cir. 1980). *Cf.* Process Gas Consumers Group v. Department of Agriculture, Nos. 79-1336, *et al.* (D.C. Cir. July 29, 1981), slip op. at 25 (*"Process Gas II"*) (section 401(a) not intended to "reach the activities of local distributors").

was enacted, the Commission's end use methodology was firmly established.[11]

Section 401 of the NGPA was designed to remedy a gap in the standard end use scheme. As numerous legislators explained, standard end use plans did not provide any special protection for agricultural users of natural gas.[12] Consequently, when natural gas supplies were short, agricultural users had to compete with large numbers of industrial users for the natural gas that remained following disbursal to preferred users. The ramifications of this priority schedule were far-reaching. In some cases, temporary shortages of natural gas were responsible for causing the complete destruction of agricultural products.[13]

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[11] Prior to the NGPA's enactment, there was no specific statutory authority for end use plans. Such plans were therefore challenged as illegally reallocating natural gas among pipeline customers and as illegally discriminating among customers. We rejected both grounds for concluding that end use plans are illegal *per se*. *See* American Smelting & Refining Co. v. FPC, 494 F.2d 925, 936 (D.C. Cir.), *cert. denied*, 419 U.S. 882 (1974) (end use plans do not reallocate natural gas within the meaning of 15 U.S.C. § 717f(a)); North Carolina v. FERC, 584 F.2d 1003, 1007 (D.C. Cir. 1978) (end use plans are not *per se* discriminatory). With the enactment of the NGPA, and its scheme of end use priorities, the legality of end use plans is now beyond question.

[12] The omission of a priority category for agricultural users was not simply a matter of oversight. On the contrary, agricultural users had sought special treatment before the Commission in several proceedings. *See, e.g.*, Southern Natural Gas Co., 54 F.P.C. 2298, 2306, *amended on other grounds*, 54 F.P.C. 2647 (1975); Texas Eastern Transmission Corp. (Carnegie Natural Gas Co.), 52 F.P.C. 1814, 1819 (1974), *amended on other grounds*, 53 F.P.C. 220, 53 F.P.C. 407 (1975). The Commission had rejected pleas for special treatment on the ground that curtailment should be based on types of gas burning equipment rather than on the end-product for which natural gas was being burned.

[13] *See, e.g.*, 124 Cong. Rec. 28,874 (1978) (remarks of Sen. Talmadge) (curtailments required dumping of milk); 123

The remedy set forth by the NGPA was to give agricultural users a high priority, second only to the highest priority of residential users, small commercial establishments, hospitals, schools and other uses for which curtailments could be life threatening or dangerous to property. The statute provides a two step procedure for implementing this new priority system. First, the Secretary of Agriculture is instructed to certify, in volumetric or percentage terms, the natural gas requirements of agricultural users needed to meet full food and fiber production.[14] Once these amounts have been certified, the Commission is instructed to reopen curtailment plans to provide, "to the maximum extent practicable," that essential agricultural users will only be curtailed when necessary to meet the requirements of the highest priority grouping.[15]

In this case, a series of shifting positions by the Secretary and the Commission has resulted in a curtailment scheme in which some agricultural users are given preference over some users in the highest priority. In his initial notice of proposed rulemaking issued on November 20, 1978,[16] the Secretary of Agriculture took the position that the Commission's traditional base year methodology[17] would be inadequate to estimate the needs of agri-

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Cong. Rec. 31,240 (1977) (remarks of Sen. Bumpers) (4.7 million chickens died in Arkansas in February 1977 due to curtailments).

[14] 15 U.S.C. § 3391(c).

[15] 15 U.S.C. §§ 3391(a), 3393. *See* note 6 *supra.*

[16] *See Notice of Proposed Rulemaking, Essential Agricultural Uses of Natural Gas* (Nov. 20, 1978), J.A. 77; 43 Fed. Reg. 54,938 (Nov. 24, 1978).

[17] As the Commission notes in its brief, not all curtailment plans rigidly follow the traditional base period methodology. *See* Brief for FERC on Rehearing En Banc of Section "2-A" of the Court's July 29, 1981 Opinion, Appendix B. Some plans, for example, employ a fixed base period for large customers,

culture. Under a base year methodology, a curtailment plan allocates natural gas to distributors according to an end use profile of their customers during a particular historical period.[18] Thus, a distributor's allotment during curtailment does not include any provision for customers added on following the base year.[19] Even when the new customers qualify for the highest priority classification, the fact that they were not serviced during the base year precludes priority treatment. Because of "the vagaries of weather whereby energy demands unpredictably vary from season to season and year to year," the Secretary proposed to replace the "impractical" historical base period concept with a certification of "100 percent of current requirements." [20]

In its proposed rule issued two months after the Secretary's proposed rule, the Commission stood by its base period approach. The Commission explained that its "pro-

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with an exemption for smaller users. *See* Joint Reply Brief on Rehearing En Banc of The Process Gas Consumers Group, *et al.* at 6 (discussing the curtailment plan for the Panhandle Eastern Pipe Line Co.). The Commission's general opinion, however, is that opening up curtailment plans to load growth would "unsettle most existing curtailment plans." *See* Brief for FERC on Rehearing En Banc of Section "2-A" of the Court's July 29, 1981 Opinion at 23.

[18] *See generally* North Carolina v. FERC, 584 F.2d 1003, 1012-13 (D.C. Cir. 1978).

[19] Similarly, a base period methodology does not account for customers who leave the distributor's system, or for reductions in the amount of natural gas demanded by those customers. Indeed, section 605 of the Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117 (1978) (codified at 15 U.S.C. § 717x) specifically provides that allotments of natural gas during curtailment should not be reduced as a result of conservation measures.

[20] *Notice of Proposed Rulemaking, Essential Agricultural Uses of Natural Gas* (Nov. 20, 1978), J.A. 89-90; 43 Fed. Reg. 54,938, 54,950 (Nov. 24, 1978).

posed rule is limited to the basis upon which the interstate pipeline now curtails." [21] In the Commission's view, this approach would minimize disruption to existing curtailment plans, in accordance with the directions of the NGPA Conference Report, which stated that:

> For purposes of implementing this section, the Commission is instructed to reopen curtailment plans that are already in effect under the Natural Gas Act only to the extent necessary to adjust those plans to bring them into conformity with the new curtailment priority schedule. The conferees were concerned that these changes not burden the Commission with lengthy proceedings which might throw existing curtailment plans into disarray. Therefore, the conference agreement includes the term "to the maximum extent practicable" to assure that the Commission has the necessary flexibility in implementing any changes. For example, the conferees do not intend the reopening of curtailment plans for this limited purpose to result in adoption of a new base year for curtailment purposes.[22]

The Secretary of Agriculture's interim final rule, issued on February 8, 1979, cut back on the broad sweep of his proposed rule. Instead of certifying one hundred percent of current requirements for all agricultural users, the Secretary proposed a dual approach applying current requirements for small scale uses and a base year methodology for other essential agricultural uses.[23] On March 6, 1979, the Commission accepted the Secretary's certification on an interim basis although it continued to state

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[21] *Notice of Proposed Rulemaking*, FERC Docket No. RM79-15 (Jan. 12, 1979), J.A. 265.

[22] *Id.*, J.A. 272. *See also Notice of Proposed Rulemaking*, FERC Docket No. RM79-13 (Jan. 10, 1979), J.A. 184-85 (quoting H.R. Rep. No. 1752, 95th Cong., 2d Sess. 113 (1978)).

[23] *Interim Final Rule, Essential Agricultural Use of Natural Gas*, J.A. 104 (Feb. 8, 1979); 44 Fed. Reg. 11,518, 11,523 (March 1, 1979).

that the amount of permissible load growth was a "vital issue" deserving further comment.[24] Following further consideration of its authority to limit agricultural load growth, the Commission reached the conclusion that it was without authority to cut back on the agricultural uses certified by the Secretary.[25] The Commission explained that:

> In the past, the Commission's policy has not favored load growth, *i.e.*, increasing new customers or base period entitlements. However, the Commission's reading of the NGPA and the many comments and legal analysis provided it in the extensive record in this proceeding leads it to the conclusion that some agricultural load growth was intended by Congress. . . . Thus, to the extent that load growth is required by USDA rule and the agricultural users [sic] (or its local distributor) has the requisite contractual authority, it is the Commission's view that Congress intended that agricultural load growth be permitted.[26]

Thus, when the Secretary subsequently returned to his initial proposal of certifying one hundred percent of current requirements for *all* essential agricultural uses,[27] the Commission incorporated this certification on a permanent basis.[28]

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[24] *Interim Curtailment Rule*, FERC Docket No. RM79-13 (Mar. 6, 1979), J.A. 212.

[25] *Order No. 29, Final Rule*, FERC Docket No. RM79-15 (May 2, 1979), J.A. 315.

[26] *Id.*, J.A. 315-16.

[27] *Essential Agricultural Uses and Requirements—Natural Gas Policy Act, Final Rule* (May 10, 1979), J.A. 162; 44 Fed. Reg. 28,782, 28,784 (May 17, 1979).

[28] *Order No. 29-A, Final Rule*, FERC Docket No. RM79-15 (June 15, 1979), J.A. 375. *See also Order No. 29-C, Order Amending Regulation, Granting in Part and Denying in Part Petitions for Rehearing and Motions for Clarification, Denying Motion for Oral Argument, and Denying Motions to Waive Regulations and Accept Late Filed Petitions*, FERC

On petitions for review, a panel of this court agreed with the Commission that it was required to open curtailment plans not only to reorder priorities, but also to add demand representing agricultural load growth into the priority category for essential agricultural use.[29] The panel recognized, however, that adding agricultural load growth, while continuing to exclude high priority load growth, would result in a seeming reversal of statutory priorities. This reversal of priorities may be illustrated by a simple example.[30] Under the traditional, "base period," approach to curtailment, a distributor who provides 100,000 units of gas to residential customers today, but only provided 50,000 units in the relevant base period, will receive natural gas during curtailment based on only 50,000 units of use. The remaining 50,000 units of demand will stand outside the ambit of the curtailment plan, and will only be served if natural gas supplies exceed the total demand accounted for by the plan. As implemented by FERC the Secretary's definition of essential agricultural use upsets this standard plan by computing agricultural entitlements based on current demand. Thus, 100,000 units of agricultural demand will be accounted for in the plan *even if* there was only 50,000 units of demand in the base period.[31] As this example readily

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Docket No. RM79-15 (Oct. 22, 1979), J.A. 405 (adherence to base periods would not fulfill the Commission's "duty to implement the certification of 100 percent of current requirements").

[29] *See Process Gas II*, slip op. at 51.

[30] This example is a variation of one presented by one of the petitioners. *See* Application of Consolidated Edison Company for Rehearing, FERC Docket No. RM79-15, J.A. 1638.

[31] The only limitation on serving new agricultural demand is that the demand fall within contract and certification amounts. *See Order No. 29, Final Rule*, FERC Docket No. RM79-13 (May 2, 1979), J.A. 316-20. This limitation was upheld by the panel opinion in this case and was not vacated as part of this *en banc* proceeding. *See Process Gas II*, slip op. at 42-45.

shows, agricultural demand created between the base period and the date of curtailment receives preferential treatment with respect to analogous demand in the highest priority. Put more graphically the distributor who serves a family or hospital that installed a gas furnace following the base period is required to wait in line behind one who supplies natural gas to a newly built beer factory. The panel concluded that this reversal of statutory priorities places the priority schedule on its head, and remanded the Commission's rule with instructions to "draft a rule that does not in practice reverse the statutory scheme of section 401." [32] The panel dissent, while agreeing that the Commission's rule should be remanded because it reverses the statutory scheme of priorities, argued that Title IV of the NGPA did not mandate a policy of agricultural load growth. The dissent concluded that the Commission should be allowed to "utilize its much needed 'expertise' to resolve this complex curtailment problem." [33] We granted rehearing *en banc* on November 13, 1981. In this opinion we conclude that the Commission has authority to review the "practicability" of incorporating load growth for agricultural users into existing curtailment plans insofar as it has consequences for the Commisison's curtailment policies regarding high priority users. Because the Commission erroneously considered itself bound to incorporate such load growth reregardless of the consequences for natural gas markets or high priority users currently placed outside the ambit of curtailment plans, we remand for further consideration.

II. The Scope of the Commission's Authority

As counsel for the Commission stated at oral argument, there is an inherent tension between section 401's delegation of certification responsibility to the Secretary and the statute's caveat that the certification need only be incorporated to "the maximum extent practicable."

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[32] *Process Gas II*, slip op. at 51.

[33] *Id.*, slip op. at 15 (Wald, J., dissenting).

The Commission's opinion, however, does not seek to resolve this tension. Rather than giving content to the practicability language of section 401 the Commission concluded that it was simply bound by law to fashion a rule that would fully accommodate the Secretary's certification.[34] In doing so, the Commission read out of the statute an important aspect of its responsibilities.

Section 401 plainly provides that essential agricultural uses need be assured second priority status only "to the maximum extent practicable." [35] In adding this

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[34] At oral argument, the Commission's counsel suggested that the "maximum extent practicable" language of section 401 only provides the Commission with authority to make adjustments to curtailment plans in accordance with section 502(c) of the NGPA, 15 U.S.C. § 3412(c). *See also* Brief for FERC on Petitions for Rehearing En Banc of Section "2-A" of the Court's July 29, 1981 Opinion at 24. Under section 502(c), the Commission may allow adjustments to any provision of the NGPA "as may be necessary to prevent special hardship, inequity, or an unfair distribution of burdens." We agree that section 502(c) provides the Commission with flexibility in implementing curtailment plans, but we fail to see how it informs our understanding of the practicability language in section 401. Especially since section 502(c) applies generally to the NGPA, while section 401 addresses the particular questions raised by curtailment plans, it is unlikely that Congress intended for section 502(c) to be the sole means by which the Commission could take advantage of the flexibility it wrote into section 401.

[35] Section 401 provides:

> Not later than 120 days after November 9, 1978, the Secretary of Energy shall prescribe and make effective a rule, which may be amended from time to time, which provides that, notwithstanding any other provision of law (other than subsection (b) of this section) and to the maximum extent practicable, no curtailment plan of an interstate pipeline may provide for curtailment of deliveries of natural gas for any essential agricultural use, unless such curtailment—
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> (1) does not reduce the quantity of natural gas delivered for such use below the use requirement specified in subsection (c) of this section; or

qualifying language, the conference committee expressed its concern that the more rigid language of the House and Senate bills would deprive the Commission of much

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(2) is necessary in order to meet the requirements of high-priority users.

15 U.S.C. § 3391(a) (emphasis added). In accordance with this directive, the Department of Energy issued a rule providing that:

(a) Notwithstanding any provision of law other than section 401(b) of the Natural Gas Policy Act of 1978, or any other rule, regulation, or order of the Department of Energy, the Federal Energy Regulatory Commission or their predecessor agencies, *and to the maximum extent practicable*, no curtailment plan of an interstate pipeline may provide for curtailment of deliveries of natural gas for any essential agricultural use, unless:

(1) Such curtailment does not reduce the quantity of natural gas deliveries for such use below the use requirement certified by the Secretary of Agriculture under section 401(c) of the Natural Gas Policy Act of 1978 in order to meet the requirements of full food and fiber production; or

(2) such curtailment is necessary in order to meet the requirements of high-priority users; or

(3) the Federal Energy Regulatory Commission, in consultation with the Secretary of Agriculture, determines, by rule or order issued pursuant to section 401(b) of the Natural Gas Policy Act of 1978, that use of a fuel (other than natural gas) is economically practicable and that the fuel is reasonably available as an alternative for such essential agricultural use.

(b) Any essential agricultural user who also qualifies as a high-priority user shall be a high-priority user for purposes of paragraph (a) of this section.

(c) The specific relative order of priority for all uses and users of natural gas, including high-priority and essential agricultural uses and users, shall remain as reflected in effective curtailment plans of interstate pipelines filed with the Federal Energy Regulatory Commission to the extent that

needed flexibility.[36] The conference committee proceeded to suggest that a "practicable" means for incorporating agriculture's heightened priority into existing curtailment plans would be to retain existing base years—that is, to raise agriculture's priority *within* existing curtailment plans without opening up such plans to accommodate the national gas needs of users not on board in the base period.[37] Notably, this proposed solution would have had *no* adverse impact on the highest priority grouping. Instead, a reordering of existing plans would have only affected the order in which priority groups *lower* than the highest priority grouping were to receive natural gas.

Although the conference report does not focus on the particular issue presented here[38]—namely, the scope of

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the relative order of priorities does not conflict with paragraph (a) of this section.

Final Rule, DOE/ERA Docket No. ERA-R-78-22 (Mar. 9, 1979), J.A. 75-76; 44 Fed. Reg. 15,642, 15,646-47 (Mar. 15, 1979) (codified at 10 C.F.R. § 580.03) (emphasis added).

[36] Both the House and Senate bills spoke in terms of "prohibiting" curtailment of essential agricultural users unless necessary to meet the requirements of high priority users. "[T]he conference agreement include[d] the term 'to the maximum extent practicable' to assure that the Commission [would have] the necessary flexibility in implementing any changes." H.R. Rep. No. 1752, 95th Cong., 2d Sess. 111-13 (1978).

[37] The conference report specifically stated that the conferees did "not intend the reopening of curtailment plans for [the] limited purpose [of bringing the schedule of priorities into conformity with the NGPA] to result in the adoption of a new base year for curtailment purposes." *Id.* at 113.

[38] Indeed, the NGPA conference report together with the conference report discussing section 605 of the Public Utility Regulatory Policies Act, Pub. L. No. 95-617, 92 Stat. 3117 (codified at 15 U.S.C. § 717x) ("PURPA"), H.R. Rep. No. 1750, 95th Cong., 2d Sess. 113 (1978), leave the distinct im-

the Commission's authority when the Secretary explicitly determines that a current requirement methodology would best serve agricultural goals—it does suggest that the Commission unduly abdicated responsibility in this case. Critical for present purposes is that the conference revisions sought to give the Commission flexibility so that it could integrate the new priority treatment for agriculture into existing curtailment plans without throwing those plans into disarray. Grafting a current requirements methodology onto a base period curtailment plan, however, could increase demand for natural gas to such a degree that it disrupts natural gas markets, and significantly increases the probability that new high priority users will be injured as a result of natural gas shortages.[39] Although an assessment of the likelihood and

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pression that Congress never expected section 401 of the NGPA to lead to any changes in the base period methodology used in curtailment plans. Section 605 of PURPA assures that when base periods are updated, natural gas customers who have reduced their demand by conserving natural gas will not be penalized. In explaining this provision, the PURPA conference report stated that "[a] change in a curtailment plan *which does not require an updating of base period data*, such as the revision required in title IV of the Natural Gas Policy Act of 1978, would not trigger the application of this section." H.R. Rep. No. 1750, 95th Cong., 2d Sess. 113 (1978) (emphasis added).

[39] Increased demand by agricultural users would have no impact on high priority users who were on board during the base period. Expansion of agricultural usage, however, would increase the probability that high priority users added onto the system after the base period will suffer curtailment. These users only receive natural gas after all of the users covered by the curtailment plan receive their natural gas. Thus, if a current requirements methodology encourages agricultural users to convert to natural gas, and substantially expands agricultural usage, new high priority users could suffer a greater risk of curtailment than the Commission considers desirable for its overall curtailment policy concerns. Under these circumstances, retention of the base period methodology

scope of these consequences and the importance of avoiding them might still lead the Commission to decide that full implementation of the Secretary's current require-

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for agricultural users may be a "practicable" means of protecting users in the highest priority group.

As an example, suppose that a pipeline currently supplies 150,000 units of natural gas, but supplied only 100,000 units in the base period. Further, suppose that the natural gas demand it serves may be broken down as follows:

	Base Year Usage	Load Growth
Highest Priority	50,000	25,000
Agricultural Priority..	10,000	10,000
Lowest Priority	40,000	15,000
	100,000	50,000

So long as the pipeline maintains a base year methodology, there should not be a significant incentive for load growth, and those customers who are added should share approximately equally in the hardship of curtailment. Therefore, if natural gas supplies drop to 125,000 units, new users should, on average, receive about 50 percent of their regular usage. If agricultural load growth receives priority treatment, however, two consequences follow. First, load growth in the other priorities is placed further down in the hierarchy for receiving natural gas during curtailment. In the example, if natural gas supplies drop to 125,000 units, there will be only 15,000 units of natural gas left over after serving those within the curtailment plan. Thus, the remaining users would receive on average 37.5 percent of their demand, rather than 50 percent. But, in addition, priority treatment for agricultural users might encourage further increases in natural gas demand for agriculture. If agricultural load growth doubled in our example, there would be only 5,000 units of natural gas to be divided up among new natural gas users, averaging out to about 12.5 percent of their regular usage—one-fourth of the amount they would receive if the base year methodology were retained.

Because the Commission did not analyze these possible consequences, we cannot assess whether their likelihood is sufficiently serious to warrant some limitation on the Secretary's certification in the interests of high priority users as reflected in the Commission's overall curtailment policy. Perhaps the

ments methodology is nonetheless appropriate, the Commission made no such determination in this case. Instead it simply found itself "required by law" [40] to adopt the Secretary's certification, no matter what the consequences might be.[41]

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problem of over-encouraging agricultural load growth to the point where this could happen is not serious, or may be controlled in some way other than to impose a base year methodology. We are not persuaded, however, that the problem may be ignored simply because section 401(b) assures that there will be some disincentive to load growth. Section 401(b), which provides that essential agricultural users will not receive priority status if there are "economically practicable alternatives" does not require agricultural users to rely on high priced alternative fuels. *See* H.R. Rep. No. 1752, 95th Cong., 2d Sess. 114 (1978). Agricultural users relying on high priced alternative fuels may therefore have an incentive to switch to natural gas if they could be assured of supplies during curtailment, and new agricultural users may choose to rely on natural gas in their original installations. The Commission's responsibility is to assess the likelihood of these events, and the seriousness of their consequences for high priority users, so that it can adjust its implementing methodology accordingly.

[40] *Order Denying Rehearing on Interim Curtailment Rule*, FERC Docket No. RM79-13 (June 20, 1979), J.A. 257.

[41] A number of parties have argued that full implementation of the Secretary's certification is "practicable" because agricultural uses make up a small portion of natural gas demand. *See, e.g.*, Joint Brief of Petitioners on Rehearing, Midwestern Gas Transmission Co., East Tennessee Natural Gas Co., Alabama Gas Corp., Air Products and Chemicals, Inc., Stauffer Chemical Co., Williamette Industries, Inc., and Southern Natural Gas Co. at 14; Brief for the United States Department of Agriculture on Rehearing En Banc at 8. Furthermore, they suggest that the experience of the last two years demonstrates that the Commission's approach will not lead to any untoward consequences. We recognize that these arguments may have some bearing on the Commission's ultimate decision whether to implement the Secretary's certification without change. In determining whether full implementation is "practicable," however, the Commission must look

Most disturbing in this case is that the Commission's narrow interpretation of its powers allows major curtailment decisions to be made without any analysis by any agency of the impact of those decisions on curtailment plans. Read together, the opinions of the Secretary and the Commission are reminiscent of Alphonse and Gaston.[42] In undertaking the task of certifying essential agricultural uses, the Department of Agriculture claims no responsibility to consider the consequences of its decision. "Nowhere," it states, "does section 401 direct USDA to focus upon pipeline curtailment plans."[43] Meanwhile, the Commission presents an interpretation of section 401 calling for complete deference to the Secretary's certification. The result of this dual denial of responsibility is a patchwork approach to curtailment policy that allows the needs of the second priority group to disrupt Commission policy geared to controlling instability in natural gas markets and protecting the interests of the higher priority users. This might occur even though it is long established in Commission practice that the growth needs of the *highest* priority grouping do not justify a blanket authorization of load growth.[44] Since this result is not dictated

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not only at agriculture's current share of the natural gas market, but also at the likely increase in that share. In addition, the Commission's assessment of the recent experience of the natural gas market should take account of the relative abundance of natural gas in recent years.

[42] Alphonse and Gaston, comic strip characters created by Frederick B. Opper, displayed excessive politeness and deference to each other in the face of crises by uttering the phrases: "After you, my dear Gaston," and "After you, my dear Alphonse." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 63 (1976).

[43] Original Brief for the Department of Agriculture and the Department of Energy at 47.

[44] *See Order No. 29, Final Rule*, FERC Docket No. RM79-15 (May 2, 1979), J.A. 315; Brief for FERC on Petitions for Rehearing of Section "2-A" of the Court's July 29, 1981 Opinion at 17-20.

by the statute, and could well frustrate Congress' manifest concern with protecting the needs of the highest priority group, we are loath to read section 401 as leaving no agency with responsibility to assess the consequences of fully incorporating a current requirements methodology. Given the Commission's traditional expertise in fashioning curtailment plans, and the statute's explicit provision that incorporation of the Secretary's certification may be conditioned on grounds of practicability, we have no doubt that the Commission is the most appropriate agency to perform this task.[45]

In reaching this conclusion, we reject the Department of Agriculture's argument that partial implementation of the Secretary's certification would render the Secretary's certification a nullity.[46] Fulfillment by the Commission of its statutory responsibility to assess the practicability of implementing methodologies, will not undermine the fundamental task assigned to the Secretary: namely, to identify agricultural uses that are "essential" and to assess what proportion of its natural gas demand an agricultural user must receive to allow for full food and fiber production.[47] Although the Secretary's

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[45] As we observed in Process Gas Consumers Group v. Department of Agriculture, 657 F.2d 459, 467 (D.C. Cir. 1981) (*"Process Gas I"*), "[t]he Secretary of Agriculture, unlike the Federal Energy Regulatory Commission, does not have responsibility for balancing the various competing interests affected by the [NGPA]." The Commission is therefore the agency most suited to determining whether superimposing the Secretary's certification on existing curtailment plans is "practicable."

[46] Brief for the United States Department of Agriculture on Rehearing En Banc at 8.

[47] It is up to the Department of Agriculture to determine how much of agricultural demand may be deemed "essential." The Department could determine, for example, that fifty percent of natural gas demand is "essential" to keep broilers from freezing or milk from being dumped. Depending on the

certification might be modified in accordance with considerations of practicability and the needs of high priority users, these modifications would reflect factors that the statute requires be accounted for and that the Secretary has neither the expertise nor the willingness to take into account in his certification decision. So long as the Commission recognizes that it has no authority to reassess the needs of agriculture, and modifications of full implementation are rationally based on an assessment of the practicability of full implementation and its impact on the legitimate needs of high priority users as the Commission defines them, the Commission would properly act within its statutory bounds.

Nor do we agree with the Department's suggestion that we should defer to the Commission's interpretation of its responsibilities, in accordance with the traditional deference afforded to an agency charged with administering its governing statutes.[48] The extent to which courts should defer to agency interpretations of law is ultimately "a function of Congress' intent on the subject as revealed in the particular statutory scheme at issue."[49] Thus, when Congress delegates full responsibility to an

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amounts certified as "essential" and the degree to which agricultural demand for natural gas has grown, implementation of the Secretary's certification may be largely compatible with existing base period methodology. It is primarily because the Department insisted upon one hundred percent of current requirements, that the base year issue was catapulted into such prominence.

[48] *See* Blum v. Bacon, 50 U.S.L.W. 4634, 4637 (U.S. June 14, 1982); Federal Election Comm'n v. Democratic Senatorial Campaign Comm., 102 S. Ct. 38, 44-47 (1981).

[49] Constance v. Secretary of Health & Human Services, 672 F.2d 990, 995 (1st Cir. 1982). When an agency interpretation is longstanding, the case for deference may be heightened by the possibility of congressional acquiescence. *See, e.g.*, Kirkuff v. Nimmo, No. 81-1770, slip op. at 11 (D.C. Cir. July 20, 1982).

agency to implement a statute, but provides little guidance on how the governing statute should be interpreted, common sense suggests that Congress would wish courts to consider agency views on questions of law that are "closely related . . . to the everyday administration of the statute and to the agency's administrative or substantive expertise." [50] Indeed, in some cases, administrative interpretations might be deserving of "legislative effect." [51] The underlying logic for deference, however, largely depends on the agency having "primary responsibility" [52] for administering a statute, so that its interpretation may fairly be characterized as being infused with the agency's expertise. In this case, the Commission *concedes* that its reading of section 401 of the NGPA is not informed by notions of how best to implement national curtailment policy.[53] Instead, the Commission simply asserts that

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[50] Constance v. Secretary of Health & Human Services, 672 F.2d at 995.

[51] An administrative interpretation is entitled to "legislative effect" when Congress explicitly delegates authority to "give substance" to a statute's terms. Herwig v. Ray, 50 U.S.L.W. 4205, 4207 (U.S. Feb. 23, 1982); *see* Batterton v. Francis, 432 U.S. 416, 426 (1977).

[52] *See* Federal Election Comm'n v. Democratic Senatorial Campaign Comm., 102 S. Ct. at 45 (quoting Buckley v. Valeo, 424 U.S. 1, 109 (1976)) ("[t]he [Federal Election] Commission is precisely the type of agency to which deference should presumptively be afforded. Congress has vested the Commission with 'primary and substantial responsibility for administering and enforcing the Act' "); Kirkuff v. Nimmo, No. 81-1770, slip op. at 10 (D.C. Cir. July 20, 1982). Arguably, the joint interpretation of several agencies as to how to divide their responsibilities should also be accorded deference. The problem in this case, however, is that the responsibility of assessing the impact of full implementation of the Secretary's certification on high priority users has not been assumed by any agency. *See* text accompanying notes 42-44 *supra*.

[53] *See* Brief for FERC on Petitions for Rehearing En Banc of Section "2-A" of the Court's July 29, 1981 Opinion at 26-27.

under the language and history of the statute, its hands are tied, no matter how disastrous the implications of its interpretation. But even the Commission must acknowledge that its shifting interpretation of its statutory authority bespeaks of an ambiguity in the statute's language and legislative history.[54] Under these circumstances, courts have an undeniable responsibility to determine whether the agency has construed its powers too narrowly.[55]

CONCLUSION

By narrowly interpreting its authority under the NGPA, the Commission may have allowed agricultural load growth to squeeze out new high priority users without any assessment of whether that result is compatible with overall curtailment policy. In this opinion, we hold that section 401's practicability language gives the Commission flexibility to adjust the Secretary's certification when so doing will appropriately advance the interests of high priority users. Because the Commission considered itself powerless to follow any course other than full implementation of a current requirements methodology for agricultural users, we remand for further proceedings.

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[54] *See* text accompanying notes 16-28 *supra*.

[55] *Cf.* FPC v. Conway, 426 U.S. 271, 279 (1976) (FPC erroneously concluded that it lacked jurisdiction to consider "price squeeze" issues); Elizabethtown Gas Co. v. FERC, 575 F.2d 885, 887-89 (D.C. Cir. 1978) (FPC erroneously concluded that it was powerless, as a matter of law, to order compensation to natural gas customers curtailed by more than the system average).

APPENDIX

ORDER GRANTING REHEARING *EN BANC*

Order granted November 13, 1981.

Before ROBINSON, *Chief Judge*, WRIGHT, TAMM, MACKINNON, ROBB, WILKEY, WALD, MIKVA, EDWARDS, and GINSBURG, *Circuit Judges.*

Order Per Curiam.

PER CURIAM: Suggestions for rehearing have been filed by the following parties:

(1) Southern Natural Gas Company

(2) Midwestern Gas Transmission Company and East Tennessee Natural Gas Company

(3) Washington Gas Light Company

(4) United Distribution Companies and the Brooklyn Union Gas Company

(5) United Gas Pipe Line Company

(6) Alabama Gas Corporation

(7) The State of Louisiana

(8) Process Gas Consumers Group, American Industrial Clay Company of Sandersville, and Georgia Kaolin Company

On consideration of the foregoing, it is

ORDERED by the Court *en banc* that the aforesaid suggestions are granted and, it is

FURTHER ORDERED by the Court *en banc* that Sections I.C and II.A of the Court's opinion, and the corresponding parts of the judgment of the Court, both issued on July 29, 1981 be, and the same hereby are, vacated.

The Court will issue an order to govern further proceedings in these cases at a later date.

Circuit Judges MACKINNON and ROBB would deny the suggestions for rehearing *en banc*.

Circuit Judges WRIGHT and TAMM did not participate in this order.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

(18 C.F.R. Part 281)

Before Commissioners:
Don S. Smith, Acting Chairman;
Georgiana Sheldon, Matthew
Holden, Jr., and George R.
Hall.

Final Regulation for the Implementation of Section 401 of the Natural Gas Policy Act	)))	Docket No. RM79-15

ORDER NO. 29
FINAL RULE
(Issued May 2, 1979)

Background

Section 401 of the Natural Gas Policy Act of 1978 (NGPA) seeks to assure that natural gas required for essential agricultural uses will not be curtailed unless curtailment is required to protect the needs of certain enumerated high priority users. Section 401 of the NGPA establishes a curtailment scheme where the Secretary of Agriculture (USDA) determines the volumetric amounts required by essential agricultural

users, the Secretary of Energy establishes curtailment priorities and the Federal Energy Regulatory Commission (Commission) establishes procedures whereby the curtailment plans of interstate pipelines carry out the Congressional policy to provide agricultural users certain protections from curtailment. The rule promulgated herein completes the Commission's process of promulgating rules to carry out its statutory responsibilities under section 401(a) of the NGPA. A rule proposing procedures for alternate fuel determinations under Section 401(B) is the subject of a separate rulemaking in Docket No. RM79-40.

Specifically, the Commission must implement the USDA and Economic Regulatory Administration (ERA) rules so that, to the maximum extent practicable, no curtailment plan of an interstate pipeline results in curtailment of deliveries of natural gas for

any essential agricultural use, below the requirement specified by the USDA unless such curtailment is necessary in order to meet the requirements of high-priority users, as that term is defined section 401(f)(2) of the NGPA.

Title IV of the NGPA creates new priority classifications for high-priority uses as defined in the statute. These are "essential agricultural uses", and "essential industrial process and feedstock uses". The ERA of the Department of Energy is studying curtailment priority policy and will likely propose rules to implement Section 402 at some future time. However, it does not appear that ERA will have done so in time to be coordinated with implementation of section 401.

Section 401(a) provides that not later than 120 days after the date of enactment of the NGPA the Secretary of Energy shall

prescribe and make effective a rule which provides that no curtailment plan of an interstate pipeline may provide for curtailment of deliveries of natural gas for essential agricultural use except to meet the requirements of enumerated high-priority users.[1]

Section 401(c) states that the USDA shall certify to the Secretary of Energy and to the Commission the natural gas requirements for essential agricultural uses in order to meet the requirements of full food and fiber production.[2]

Pursuant to section 403(b) of the NGPA and section 402(a)(1)(E) of the Department of Energy Organization Act, the Commission is charged with implementing the rules

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1/ 44 Fed. Reg., 1526 (March 1, 1979).

2/ The USDA rule is an interim final rule, and the substantive provisions thereof may be changed in their [its] final rule.

mandated by section 401 under its authority to establish, review, and enforce curtailments under the Natural Gas Act. By a separate rulemaking the Commission has promulgated an Interim Rule to give effect to section 401 for the period April 1, 1979 to October 31, 1979. The permanent rule will be effective with respect to deliveries of natural gas for the winter heating season of 1979-80 and thereafter.

The interim rule promulgated by the Commission set forth a procedure whereby high-priority users and essential agricultural users can obtain relief from curtailment of the natural gas they use. In response to the interim rule interstate pipelines have filed tariff provisions which provide high-priority users and essential agricultural users relief from curtailment in a manner analogous to the existing life and property provisions that have long been

common in pipeline tariffs. In contrast to the approach of having eligible users apply for additional supplies when necessary, the permanent rule provides protection by reordering the priority classifications in accordance with the priority system set forth in section 401 of the NGPA. The reordering places high-priority users, as defined by the statute,[3] and essential agricultural

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3/ Section 401(f)(2)(C) defines high-priority use as gas used inter alia in a "school, hospital, or similar institution." The Commission has defined schools and hospitals broadly in lieu of defining "similar institution." Section 401(f)(2)(D) provides that high-priority uses also include "natural gas in any other use the curtatilment of which the Secretary of Energy determines would endanger life, health, or maintenance of physical property". In accord with this provision, the Secretary of Energy has defined as high-priority use natural gas used "for minimum plant protection, for fire protection, in a sanitation facility, in a correctional facility, or for emergency situations pursuant to 18 C.F.R. § 2.78(a)(4)." 10 C.F.R. § 581.02(b)(6)(iv). Volumes of natural gas necessary for "minimum plant protection when the plant is shut down" and for "emergency

(footnote continued on next page)

users, as also defined by the statute, in new priority of service classifications 1 and 2, respectively.

In essence, the Commission is retrofitting existing curtailment plans to accommodate the new Congressional mandate in § 401. In doing so, the Commission is not unmindful of the State of North Carolina v. F.E.R.C. 584 F 2d 1003 (D.C. Cir. 1978) where an end-use curtailment plan was found deficient both because the natural gas was allocated using base period data which did not bear relationship to current end-uses of the natural gas, and because the Commission failed to consider the differing impact of the plan

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(footnote cont'd)

situations pursuant to 18 C.F.R. §278(a)(4)" are not based upon historical requirements for which entitlements can be appropriately calculated. Accordingly the rule requires every pipeline to include an emergency relief clause providing for delivery of such volumes. 18 C.F.R. §281.204(c).

on full and partial requirements customers. However, North Carolina involved review of a curtailment plan implemented solely under the authority of the Natural Gas Act. In section 401 Congress mandated that the Commission modify curtailment plans (which have been implemented under the NGA) to protect essential agricultural uses of natural gas, except to the extent the natural gas is necessary for high-priority uses. The section 401 requirement is superimposed upon the Natural Gas Act standards for a curtailment plan. By Congressional mandate, it must be implemented notwithstanding the standards which have historically controlled determination of lawfulness of curtailment plans under the NGA. Therefore, the Commission does not believe that North Carolina controls this rulemaking.

Moreover, in implementing section 401, Congress has indicated that it does "not

intend the reopening of curtailment plans for this limited purpose [of protecting essential agricultural requirements] to result in adoption of a new base year for curtailment purposes". Conf. Report No. 1752, 95th Cong. 2d Sess. 113 (1978). If the Commission were to apply the rule in North Carolina to the curtailment plans resulting solely from implementation of § 401, it would necessarily require the Commission to reopen all existing curtailment plans which have been found just and reasonable. This result is both administratively infeasible and contrary to Congressional intent.

The Secretary of Energy and the USDA have promulgated the statutorily required rules. On March 9, 1979, the ERA promulgated a final rule wherein certain terms are defined, and wherein curtailment priorities as set forth in section 401 of the NGPA are established. Likewise, the Secretary of

Agriculture has promulgated an Interim Final Rule (44 Fed. Reg. 11526, March 1, 1979) which establishes the volumetric requirements for essential agricultural users. (7 C.F.R. § 2900.4)

To implement the statutorily mandated upgrading of priorities in accord with the USDA and ERA rule, the Commission issued a Notice of Proposed Rulemaking on January 12, 1979, in this docket. The deadline for filing Comments was March 20, 1979. Public hearings were held in various locations.[4]

4/ March 6, 1979 - California Public Utilities Commission, California State Building, 350 McAlister Street, San Francisco, California

March 9, 1979 - Holiday Inn, 1911 I-40E at Ross, Amarillo, Texas

March 13 and 14 - Federal Energy Regulatory Commission, 825 North Capitol Street, N.E., Washington, D.C.

March 16, 1979 - Wisconsin Public Service Commission, 4802 Sheboygan Avenue, Madison, Wisconsin

(footnote continued on next page)

On the basis of the record established, including the written and oral comments received, the Commission has modified its initial proposal and now promulgates the rule contained herein.

The Commission has had the benefit of consultation with the USDA as contemplated by section 401. This consultation has been extremely valuable to the Commission in its process of evaluating and determining the method by which to implement section 401. The Commission is aware, however, that consultation does not imply concurrence by the USDA with all aspects of this rule.

The Rule

Under the permanent rule promulgated today, most customers -- both direct

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(footnote cont'd)

March 19, 1979 - Arkansas Public Service Commission, Justice Building, Little Rock, Arkansas

customers and local distribution company customers -- of interstate pipelines will be required to re-examine the data used to determine base period volumes for curtailment plans in order to identify which volumes meet the ERA's definition of priority 1. Only volumes whose deliveries are protected by the NGPA before deliveries to essential agricultural users will be included in priority 1. The rationale for this treatment stems from the Secretary of Energy's definition of "high-priority use" (Priority 1). In the ERA rule, "high-priority use" is not defined in the same manner as the definition of "high-priority use" in the currently effective curtailment plans of certain interstate pipelines. Schools, hospitals, and large apartment buildings included by ERA in priority 1 generally were not given priority 1 treatment in most interstate pipeline plans. Likewise, some curtailment plans of

interstate pipelines may have included in their priority 1 classification end-uses which are not categorized in the priority 1 category by the Department of Energy.

Pipeline curtailment plans will include a new priority 2 which will contain the requirements necessary to serve essential agricultural uses as defined by the Secretary of Agriculture.

The USDA interim rule defines volumetric requirements:

> § 2900.4 Essential agricultural volume requirements.
>
> (a) For purposes of section 401 of the NGPA, Essential Agricultural Volumetric Requirements are certified to be:
>
> (1) For each Essential Agricultural Use Establishment which (i) uses natural gas on farm for agricultural production, or (ii) consumes 300 mcf or less of natural gas per peak day (whether such Essential Agricultural Use Establishment is in existence on the effective day of this rule or comes into existence thereafter) - 100 percent of the current requirements.

(2) For each Essential Agricultural Use Establishment not included in paragrapy (1) (whether such Essential Agricultural Use Establishment is in existence on the effective date of this rule or comes into existence thereafter) - the higher of:

(i) The actual volume of natural gas used by such Essential Agricultural Use Establishment (corrected to include amounts of process and feedstock gas not used because of curtailment or plant shutdown) during the applicable period of the most recent 3 years (updated annually) which has the highest corrected volume; provided, however, that if any such Essential Agricultural Use Establishment shall have been in exitence less than 3 years, the applicable period shall be that having the highest correct volume of such Essential Agricultural Use Establishment's existence; or

(ii) The maximum volume such Essential Agricultural Use Establishment would be entitled to purchase under the interstate pipeline's curtailment plan in effect on the effective date of this rule.

The volumes included in the other priority classifications in an interstate pipeline's plan must be reduced to the extent that those volumes are now placed in new priorities 1 or 2. Uses not included in

priorities 1 or 2 would be handled in accord with current curtailment plans, but deliveries of all such volumes would be given a lower preference than delivery of new priority 1 and 2 volumes.

The changes in curtailment plans are to be implemented on November 1, 1979. It will be necessary for the interstate pipelines to revise the volumes of natural gas reflected in each category of service in their curtailment plans in order to affect the changes brought about by the NGPA. Thus, although the rule will not be implemented until November 1, substantial work will be required before that date to prepare for its implementation. End-users, local distribution companies, and interstate pipelines will immediately commence work to modify the curtailment plans of the interstate pipelines in accordance with this rule and the NGPA.

In past curtailment proceedings the parties have often arrived at a settlement of all issues without resort to adjudicatory proceedings before the Commission. This procedure may be appropriate here, and nothing in the rule precludes any interstate pipeline and its customers from proposing, as a settlement, a curtailment plan that differs from that set out in our rule. Such a settlement will be evaluated by the Commission in the light of its responsibility to meet the statutory goal of protecting, to the maximum extent practicable, high priority users and essential agricultural uses.

Summary of Comments and of Revisions of Commission Rule.

On January 12, 1979, the Commission issued its Notice of Proposed Rulemaking for development of a curtailment rule to implement section 401 of the NGPA on a permanent

basis. The proposed rule was issued prior to final action of ERA and USDA with respect to issuance of their final rules required by section 401.[5] The Commission now has the benefit of the final ERA rule and the interim final USDA rule.

The Commission's final rule adopts the ERA rule in its entirety, and the Certification of "Essential Agricultural Use" and Volumetric Requirements of USDA's interim final rule. Interstate pipelines are required to provide gas to supply the certified volumetric requirements for those users designated by the USDA.[6] However, the

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5/ ERA's final rule was issued on March 9, 1979, and the Interim Final Rule of USDA was issued to become effective on February 28, 1979, until superceded by a permanent rule expected to be issued on or about April 30, 1979.

6/ The Department of Agriculture certified essential agricultural uses without regard to contract or service limitations.

interstate pipeline is not required to deliver natural gas to any customer in violation of any volumetric limitations set out in the contract between the interstate pipeline and its customer.

The Commission recognizes that incorporation by reference of the USDA rule will result in some expansion in the entitlements over the entitlements contained in current pipeline curtailment plans. In the past, the Commission's policy has not favored load growth; i.e., increasing new customers or base period entitlements. However, the Commission's reading of the NGPA and the many comments and legal analysis provided it in the extensive record in this proceeding leads it to the conclusion that some agricultural load growth was intended by Congress. The Commission has determined it must make the appropriate modifications where necessary to carry out the Congressional mandate.

The Commission's reading of section 401, amply supported by the rulemaking record, indicates that Congress intended to up-grade the priority classification of essential agricultural users while specifically protecting high-priority users. However, Congress did not mandate that high-priority load growth. Thus, to the extent that load growth is required by the USDA rule and the agricultural users (or its local distributor) has the requisite contractual authority, it is the Commission's view that Congress intended that agricultural load growth be permitted. The Commission recognizes that if gas supplies are inadequate this may require some disruption of service to established consumers but the legislative history indicates that Congress was prepared to accept such an impact.

The significance of the Commission's statement in the interim rule that pipelines

are not required to serve those certified USDA volumetric requirements if serving them would require providing gas in excess of volumetric specifications in contracts or certificates of public convenience and necessity was a subject of much comment and discussion by the parties to this rule-making. Some commentors took the position that section 401 created new natural gas entitlements that override existing certificates or contracts. However, it was pointed out by many other parties that increased service by interstate pipelines is governed by section 7 of the Natural Gas Act (NGA) dealing with certificates of public convenience and necessity while curtailment plans in contrast deal with reductions in existing service. Most of the speakers questioned at the hearings agreed that section 401 of the NGPA does not compel an interstate pipeline to serve an essential agricultural user

who is not now served by that pipeline. The view expressed was that absent the issuance of a certificate of public convenience and necessity under section 7 of the NGA interstate pipelines cannot be required to increase service to existing customers or attach new customers. There was no indication that Congress, in enacting the NGPA intended to override the certificate requirements of section 7 of the NGA. It was pointed out by a number of speakers including representatives of several state Commissions that the policies of local distribution companies regarding the addition of new customers is generally subject to state regulation. The Commission does not believe that section 401 binds state regulators to order local distribution companies to add new customers, increase deliveries or execute new or modified contracts or service agreements.

In general, it is the Commission's view that contract and certificate limitations would apply whether or not the Commission made a specific reference to them in its regulation. The Federal Power Commission (FPC) in allocating diminished supplies of natural gas to users with existing contracts was required to override certain contract features but it was generally recognized that curtailment plans did not create additional contract entitlements.

In discussing the natural gas shortage and the need for curtailments, the United States Supreme Court stated:

> The shortage is said to require curtailment of contracted natural gas deliveries by Transco to its customers during periods of high demand. The curtailment plans concern methods of allocating the shortfall among the various customers. FPC v. Transcontinental Gas Pipeline Corp., 423 U.S. 326, 327-8 (1976).

This statement indicates the Supreme Court's recognition, that curtailments are superimposed upon existing contractural relationships.

Similarly, in its initial discussion of the Transco curtailment case the United States Court of Appeals for the District of Columbia stated:

> When a pipeline company's natural gas supplies become inadequate to meet contractual commitments to customers, there must be a provision--through a curtailment plan--for apportioning the diminishing gas supply among the customers. State of North Carolina v. FERC, No. 76-2102 (D.C. Cir. 1978), slip opinion at 8.

The FPC's later curtailment plans did not recognize the contract distinction between firm and interruptible contracts. The underlying goal in the FPC's curtailment policy was to establish a system of priorities of service based on the end use of the natural gas. The firm interruptible contract

distinction does not provide an adequate basis for determining the end use of the gas. In general, however, except where it was necessary to achieve end-use principles, curtailment policy has recognized that entitlement to gas requires both contractural authority as well as recognition in a curtailment plan.

The Commission adopts the USDA's certification of essential agricultural uses, but fully recognizes that increases in service are still subject to applicable state law, to section 7 of the NGA, and, existing contracts to which the interstate pipeline is a party. Parties are free to amend their contracts and pipelines are free to file applications for new or amended certificates under section 7.

In all other respects, it is the Commission's intention to preserve the existing base period data and method of

implementation of existing interstate pipeline curtailment plans. We are particularly mindful of the Statement of Managers which expresses a clear desire to avoid disruption of existing curtailment plans upon implementation of section 401.

Alternate Fuel Test.

The Commission is authorized by Section 401(b) of the NGPA to exercise its authority to approve or modify certified volumes of all essential agricultural users through application of a statutory alternate fuel test. The Commission, under Docket No. RM79-40, is issuing today as a corollary rule, a Notice of Proposed Rulemaking which notices a rule providing for procedures for making the alternate fuel determination. Accordingly, those principles will not be addressed here.

Data Verification Committees.

The concept of using a Data Verification Committee (DVC) in order to deal with data management problems on each pipeline as expressed in the Commission's proposed rule received considerable attention in the comments of the parties. The agricultural community strenuously objected to this use of the DVC. Agricultural representatives argued that the proposed rule would vest too much power in the DVC by virtue of giving them fact-finding authority. They also argued that agricultural representatives were not included as standing members. Many agricultural users stated that, rather than deal with a DVC, they would prefer to come directly before the Commission to resolve data problems.

The Commission in deference to the strong reservations of the agricultural community about DVC procedures, and to

questions whether the Commission could lawfully delegate its authority to a DVC, has determined that it will not utilize these committees in a fact-finding mode.

However, the Commission believes that the record indicates that the DVC's would be useful in a more limited capacity than in the proposed rule. There is a need to insure that all data are expressed in a consistent fashion and that data be reviewed for mechanical and reporting errors. There is also a need for a forum which would permit exchanging data and information among the various pipeline customers affected by a pipeline curtailment plan. Finally there is a need to discuss matters in controversy so that all parties and the Commission can understand the issues that the Commission must address. The Commission believes that the DVC's can perform these limited functions in a legally appropriate fashion and

in a way that will assist and not prejudice any customer in obtaining its legal entitlements.

Attribution

The rule promulgated provides an attribution mechanism so that agricultural users, local distribution companies, and interstate pipelines that receive gas from more than one source can allocate their priority needs of natural gas among those sources.

The permanent rule re-orders the priority classifications of pipelines' existing curtailment plans. The Commission believes high priority and essential agricultural requirements should be attributed among suppliers based on the underlying curtailment plans of the interstate pipeline suppliers. Accordingly the requirements will be attributed to a particular direct supplier based on a fraction equal to the entitlements from that supplier divided by total supplies from

all sources, including non-pipeline supplies. An essential agricultural user or local distribution company with supply sources which supplemented interstate pipeline supplies, during the base period of the pipeline's curtailment plan would not be attributed to interstate pipeline suppliers.

Storage.

The revised curtailment priorities embodied in the ERA rule seeks to protect customer storage injection volumes not reasonably necessary to meet high priority and essential agricultural requirements. The Commission believes this purpose can be achieved by treating storage as it is treated in the currently effective curtailment plan of each interstate pipeline. Those pipelines which sprinkle storage volumes, will thus include some storage volumes on their new priority 1 and 2 categories. Pipelines which do not sprinkle storage will keep

storage in the priority where it is now reflected. It will be given a lower preference than high priority and essential agricultural requirements. However, nothing in this rule prohibits a pipeline which does not use storage sprinkling from making a filing under section 4 of the Natural Gas Act, which would reclassify customer storage injection volumes in a manner which is consistent with and achieves the purpose of the ERA rule.

Section-by-Section Summary of the Final Rule.

The following is a section-by-section summary of the Commission's final rule.

Purpose (§ 281.201)

This section states that it is the purpose of this subpart to provide effective November 1, 1979, that the curtailment plans of interstate pipelines protect, to the maximum extent practicable, deliveries of

natural gas for essential agricultural uses and high priority uses.

Applicability (§ 281.202)

The subpart applies to the following interstate pipelines:

Alabama-Tennessee Pipeline Company
Algonquin Gas Transmission Company
Arkansas Louisiana Natural Gas Company
Cities Service Gas Company
Colorado Interstate Gas Company
Columbia Gas Transmission Corporation
Consolidated Gas Supply Corporation
East Tennessee Natural Gas Company
Eastern Shore Natural Gas Company
El Paso Natural Gas Company
Florida Gas Transmission Company
Great Lakes Gas Transmission Company
Inter-City Minnesota Pipelines, Ltd., Inc.
Kansas-Nebraska Natural Gas Company, Inc.
Lawrenceburg Gas Transmission Company
Michigan-Wisconsin Pipeline Company
Mid-Louisiana Gas Company
Midwestern Gas Transmission Company
Mississippi River Transmission Company
Montana Dakota Utilities Company
National Fuel Gas Supply Company
North Penn Gas Company
Northern Natural Gas Company
Northwest Pipeline Corporation
Panhandle Eastern Pipeline Company
South Georgia Natural Gas Company
Southern Natural Gas Company
Southwest Gas Corporation

Tennessee Gas Pipeline Company, a
Division of Tenneco, Inc.
Tennessee Natural Gas Lines
Texas Eastern Transmission Corporation
Texas Gas Transmission Corporation
The Inland Gas Company
Transcontinental Gas Pipeline
Corporation
Transwestern Pipeline Company
Trunkline Gas Company
United Gas Pipe Line Company
Western Gas Interstate Company

Definitions (§ 281.203)

This section defines the following terms as they are used in this subpart:

"Currently effective curtailment plan" means the plan for natural gas curtailment which an interstate pipeline had in effect on March 1, 1979;

"Direct sale customer" means an essential agricultural user that purchases natural gas directly from an interstate pipeline and consumes such natural gas for an essential agricultural use;

"Essential agricultural use" means any use of natural gas, certified by the

Secretary of Agriculture as such a use under section 401(c) of the NGPA, as identified in 7 C.F.R. § 2900 et seq.;

"End-use curtailment plan" means a tariff provision that requires that, if there is a supply shortage, curtailment of natural gas deliveries will be based on end-use factors;

"Indirect sale customer" of an interstate pipeline means an essential agricultural end-user served by a local distribution company which is served directly or indirectly by an interstate pipeline;

"High-priority user" means a person who uses natural gas in a residence, a small commercial establishment, a school or hospital, or for police and fire protection, sanitation or correctional facilities.

"Local distribution company" means a local distribution company served directly by an interstate pipeline.

This section also defines alternate fuel; entitlements; rolling base period; residence; small commercial establishment; hospital; and school.

Section 281.203(b) provides for cross-references which are essential agricultural requirements, and index of entitlements.

Tariff Filing Requirements (§ 281.204).

Paragraph 281.204(a) states that an interstate pipeline must file tariff sheets which provide that natural gas will be delivered in accordance with provisions of this subpart. If the pipeline has no curtailment plan, it must file a tariff which includes one that complies with this subpart by October 1, 1979. If the pipeline has curtailment provisions in its currently effective tariff, it shall file amendments to that tariff reflecting a curtailment plan which complies with this subpart no later than October 1,

1979. The effective date of all such tariffs will be November 1, 1979.

Paragraph 281.204(b) states that the index of entitlements for an interstate pipeline with an end-use curtailment plan shall identify the natural gas entitlements in each priority of service category (determined under § 281.205(a)) for each direct sale customer, each local distribution company, and each interstate pipeline purchaser. The indices of entitlements will be periodically updated. For curtailment plans using a fixed base period, new indices reflecting changes in Priority 2 entitlements are due each October 1st for a proposed effective date of November 1st. For plans now using a rolling base period, annual updates in Priority 2 index of entitlements must be filed when other end-uses are updated in accordance with currently effective tariffs. Other amendments to the indices must

be made if the Commission determines, under Subpart C, that essential agricultural user has an alternative fuel availability for Priority 2 entitlements, and removes that essential agricultural use for priority 2 and places it in the appropriate curtailment category.

Each tariff shall contain provisions that require interstate pipelines to provide for delivery of enough gas to respond to emergency situations during periods of curtailment in order to forestall irreparable injury to life, property or for minimum plant protection during shut-downs. (§ 281.204(c))

The delivery requirements of this subpart will not exceed the volumetric requirements of the contract between a pipeline and its customer.

General Rule (§ 281.205)

Paragraph 281.205(a) requires interstate pipelines to establish a high-priority use category designated as priority 1 and an essential agricultural use category designated as priority 2. Priority 1 shall include all high-priority use entitlements of direct and indirect customers and related storage injection volumes. Priority 2 shall include all essential agricultural use entitlements of its direct and indirect customers and related storage injection volumes.

The method of curtailment for end-use curtailment plans requires that deliveries of natural gas be curtailed sequentially beginning with the lowest priority of service category. All categories must be fully curtailed before priorities 1 and 2 are curtailed. Priority 1 shall be curtailed last (§ 281.205(b)(1)). Subparagraph 231.205(b)(2) requires that all priority

categories in existing plans be placed below new categories 1 and 2. Entitlements in existing categories must be reduced to the extent that entitlements have been placed in categories 1 and 2.

Paragraph 281.205(c) requires an interstate pipeline to classify customer storage injection gas in the same manner as in the curtailment plans in effect on March 1, 1979. If gas volumes for storage are classified by end-use, the pipeline must recalculate volumes for each priority category according to the index of entitlements. Otherwise, no storage injection volumes may be recalculated, reclassified or included as Priority 1 or 2 entitlements.

The calculation of entitlements in priority of service categories shall be computed in the following manner: for Priority 1 in accordance with § 281.206; for Priority 2 in accordance with § 281.207. Each

interstate pipeline with an end-use curtailment plan shall reduce entitlements to all other categories of service to extent those entitlements have been placed in Priority 1 or 2.

Classification of Priority 1 Entitlements (§ 281.206)

Paragraph (a) of this section defines "high-priority entitlements" as the volume of gas a person (direct sale customer, local distribution company or interstate pipeline purchaser) is entitled to receive under the current curtailment plans of the particular interstate pipeline on account of its own high-priority uses and also (in the case of a local distribution company or the pipeline itself) those of its customers. A pipeline is entitled to receive gas for its own high-priority uses and the high-priority uses attributed by direct sale customers and local

distribution company customers to the pipeline as a source of that gas.

Paragraph 281.206(b) states that local distribution company customers and direct sale customers may request each of its direct interstate pipeline suppliers to classify as Priority 1 entitlements natural gas that either entity is entitled to purchase for its high-priority uses.

The customer must designate the entitlements in each priority of service category in the current curtailment plan for which Priority 1 reclassification is requested and request that these entitlements be removed from categories of service in the currently effective curtailment plan.

An interstate pipeline must reclassify high-priority entitlements as requested and must reduce by an equal amount the entitlements in the priority of service categories

designated by the direct sale customer or local distribution company.

Paragraph 281.206(c) prescribes the same procedure for interstate pipeline purchasers which request reclassification of high-priority entitlements from interstate pipeline suppliers. The interstate pipeline purchaser shall designate these high-priority entitlements and request that those entitlements be removed from other categories of service. These high-priority entitlements are equal to the attributed Priority 1 entitlements calculated under section 281.209.

Classification of Priority 2 Entitlements (§ 281.207)

Paragraph 281.207(a)(1) states that direct sales customers may request Priority 2 classification for their essential agricultural uses (calculated under section 281.208) from direct interstate pipeline

suppliers. Under subparagraph (a)(2), the essential agricultural users must designate the entitlements in the priority of service categories of existing plans and request their removal. The pipeline will then reclassify essential agricultural use requirements as Priority 2 entitlements and accordingly reduce entitlements in other priority of service categories as the customer designates.

Under paragraph (b), an indirect sale customer which is an essential agricultural user may request that its local distribution company which supplies the customer directly ask the pipeline supplier to reclassify the customers indirect essential agricultural requirements as Priority 2 entitlements.

Paragraph (c) states that a local distribution company must attribute the indirect essential agricultural requirements for which reclassification is sought by

indirect sale customers to direct interstate pipeline suppliers, in accordance with § 281.209. Local distribution companies must request direct interstate pipeline suppliers to classify indirect essential agricultural requirements as Priority 2 entitlements. Under subparagraph (c)(2), the entitlements designated by the local distribution company to reflect attributed indirect essential agricultural requirements are removed from the category of service in which they are found in existing curtailment plans. The interstate pipeline shall reclassify the indirect essential agricultural requirement as a Priority 2 entitlement and reduce the entitlements of the local distribution company in other categories as designated.

An interstate pipeline purchaser, under § 281.207(d), may request each of its direct interstate pipeline suppliers to

classify the attributable indirect essential agricultural requirements as Priority 2 entitlements in the currently effective curtailment plan of the supplier.

Under subparagraphs 281.207(d)(2) and (3), the interstate pipeline purchaser will designate the entitlements in the current plan of the supplier and request their removal from the existing priority of service category. The supplier shall then classify the attributed Priority 2 entitlements as priority 2 entitlements and reduce the current priority of service categories as designated by the purchaser.

Calculation of essential agricultural requirements and attributable Priority 2 entitlements (§ 281.208)

The total essential agricultural requirement of an end-user will be the volumes certified by the Secretary of Agriculture and calculated in accordance with 7 C.F.R. § 2900.4 and reduced to the extent of any

alternate fuel determination in accordance with subpart C under Section 401(b) of the NGPA. These volumes shall be calculated on a daily, monthly and seasonal basis. The direct essential agricultural requirement is that part of the total requirement attributable under § 281.209 to the direct interstate pipeline supplier. The indirect essential agricultural requirement is that portion attributable to a direct local distribution company supplier.

Under § 281.208, paragraph (b) prescribes how the essential agricultural user calculates its total, direct and indirect essential agricultural requirements. An essential agricultural user will compute current requirements as they are designated by the Secretary of Agriculture in accordance with Title 7 of the Code of Federal Regulations, § 2900.4, minus any volumes determined by the Commission as replaceable by

an alternate fuel. As used in 7 C.F.R. Part 2900, current requirements means the energy used during the most recent 12 months for which there is a record or the maximum volume which a user could consume presently for essential agricultural uses. Paragraph (c) states that the local distribution companies calculate attributable indirect essential agricultural requirements for its end-user customers by dividing their customers' essential agricultural requirements among the companies' direct pipeline suppliers. Interstate pipeline purchasers calculate attributable Priority 2 entitlements under paragraph (d) by attributing Priority 2 entitlements in each purchaser's index of entitlements among that purchaser's direct interstate pipeline suppliers.

Attribution (§ 281.209)

Section 281.209 sets forth the rules for attributing total essential agricultural requirements by an essential agricultural user, indirect essential agricultural requirements of an essential agricultural user by its local distribution company supplier, and Priority 1 and 2 entitlements by an interstate pipeline. This section is inapplicable to any end-user or distribution company which has only one source of gas and to any pipeline which does not receive gas from another pipeline.

Natural gas from all direct sources shall be included in the computations for purposes of attribution.

However, if an essential agricultural user attributes any part of its essential agricultural requirements to a source other than a direct supplier as defined in paragraph (c) (for example, synthetic natural

gas facilities or independent producers), the user may not seek reclassification to priority 2 for that gas. Similarly, a local distributor may not seek priority 2 for any part of its indirect essential agricultural requirements attributed to a source other than a direct supplier. And an interstate pipeline purchaser may not seek priority 1 or 2, reclassification for any part of the priority 1 or 2 volumes to which it is entitled which are attributed to a source other than a direct supplier.

Essential agricultural user.

Under paragraph 281.209(d) an essential agricultural user must compute its requirements attributable to one direct supplier by multiplying total essential agricultural requirements by the annual quantity entitlement from said supplier, then dividing the result by the total volume of gas received from all sources during the base

period of the direct supplier's current curtailment plan. Operative definitions are found in paragraph (c). If the user lacks entitlement with only one of its suppliers, the requirement attributed to that supplier is that part of the user's total essential agricultural requirements not attributed elsewhere. When a user lacks entitlements with more than one supplier the essential agricultural requirements attributable to any one supplier is found by multiplying the unattributed portion of the total requirements by the volume of gas received in 1972 from that supplier, and dividing the result by total 1972 supplies received.

Local distribution companies

Under paragraph 281.208(e), a local distribution company calculates its indirect essential agricultural requirements attributable to a direct supplier by multiplying those requirements by the annual

quantity entitlements from the supplier and dividing the result by the total volume of gas received from all sources during the base period of the fixed period in the current curtailment plan of the supplier used to establish a customer's entitlements.

Interstate pipelines

An interstate pipeline will attribute priority 1 and 2 entitlements respectively to a direct supplier according to paragraph (e) by multiplying total priority 1 and 2 entitlements respectively by the annual quantity entitlements from the supplier and dividing the product by the total volume of gas received from all sources during the base period of the supplier's current curtailment plan.

Conflicting Data (§ 281.210)

Under paragraph (a), an interstate pipeline may not include in its index of entitlements under Priorities 1 or 2 any

volumes requested to be so classified, if any information in the records of the pipeline differs from request for reclassification of Priority 1 or 2 entitlements. Under paragraph (b) a local distribution company is prohibited from seeking classification of volumes as requested if similar discrepancies arise between its records and the request of an essential agricultural user.

Filing and Documentation (§ 281.211)

Priority 1

Under subparagraph (a)(1), the requests for reclassification of high-priority entitlements to Priority 1 entitlements made by direct sale customers and local distribution companies must be submitted in writing by June 15, 1979, and accompanied by tables showing both high-priority entitlements and the end-users of the gas in the priority of service category being

reclassified and the end-use data used to establish high-priority requirements and the designated end-use of the natural gas.

Subparagraph (a)(2) sets July 15, 1979 as the deadline for written requests by interstate pipeline purchasers to request that their pipeline supplier's reclassify high-priority requirements in currently effective curtailment plans as Priority 1 entitlements. Such requests must be accompanied by tables of high-priority entitlements and end-uses in each category of the supplier's plans for which reclassification is requested, copies of end-use data used to establish high-priority requirements, and a table indicating volumes and priority of service categories for which the purchaser's customers sought reclassification.

Priority 2

Under subparagraph (b)(1), essential agricultural users requesting that local

distribution companies or direct interstate pipeline suppliers classify essential agricultural requirements to Priority 2 entitlements must do so in writing no later than June 15, 1979 and include a sworn statement which includes the volumes and end-use of gas requested to be made Priority 2, the SIC Code activities of the user, data and calculations used to determine essential agricultural requirements under USDA regulations (7 C.F.R. § 2900.4) and a copy of a users petition for an alternate fuel determination for any boiler fuel facility, if appropriate.

Paragraph (b)(2) establishes June 30, 1979 as the deadline for written requests by local distribution companies to direct interstate pipeline suppliers requesting Priority 2 classification. Such requests must contain appropriate calculations and copies of all requests received from the

particular company's essential agricultural user customers.

Interstate pipeline purchasers must request from suppliers classification of attributable Priority 2 entitlements as Priority 2 entitlements no later than July 15, 1979 and in writing, according to subparagraph (3). Appropriate calculations and copies of customer requests must accompany the request.

Subparagraph (4) states that the data required under paragraph (b) must be filed in years after 1979 only if a change in Priority 2 is sought. The deadline dates will continue to be applicable except for any interstate pipeline with a rolling base period.

Draft Tariff Sheets and Index of Entitlements (§ 281.212)

This section requires that each interstate pipeline prepare draft tariff sheets and a draft index of entitlements in accordance with this regulation and serve these documents on all customers and, together with all § 281.210 documents, on the Data Verification Committee no later than August 1, 1979. The same deadline holds true for subsequent years, except for pipelines with a rolling base period which are permitted to prescribe an appropriate date.

Data Verification Committee (§ 281.213)

Paragraph (a) requires, at a minimum, that the Data Verification Committees be composed of a representative of the interstate pipeline, of the Commission staff, both a large and small local distribution company, and an essential agricultural user. State and local regulatory bodies and a

representative of the Department of Agriculture may be members at their option.

The Committees will receive all calculations behind the draft tariff sheets and the proposed index of entitlements. Any information requested by the Committee shall be supplied by the interstate pipeline.

Under paragraph (c) any customer of an interstate pipeline may file a written protest concerning the index of entitlements. The protests shall be filed by August 24, 1979.

Paragraph (e) provides that the Committee shall prepare a report concerning the draft tariff sheets and shall, at least, specify arithmetic errors, and prepare an evaluation of all protests. Such reports shall be submitted to the interstate pipeline no later than September 23, 1979.

Notice, complaint and remedy (§ 281.214).

Any direct sale customer or local distribution company aggrieved by an alleged violation of this rule shall file complaint in accordance with 18 C.F.R. § 1.6 within 45 days of notice.

If a violation is found by the Commission, it shall take whatever action it deems appropriate.

Additional Relief (§ 281.215)

Upon rejection of a request for Priority 1 or 2 classification under § 281.206 or otherwise, or the failure of a local distributing company to request reclassification on behalf of an end-user, for any reason, the aggrieved party may file a request for relief from curtailment which conforms with Commission regulations in 18 C.F.R. § 1.7. The request shall contain the information required in 18 C.F.R. § 2.78(b).

(Natural Gas Policy Act of 1978, P.L. 95-621; Department of Energy Organization Act, P.L. 95-91; E.O. 12009, 42 F.R. 46267)

In consideration of the foregoing part 281, Subpart B, Subchapter C, Chapter 1, Code of Federal Regulations is amended effective 30 days following publication as set forth below. By the Commission.

(S E A L)

Kenneth F. Plumb
Secretary.

1. Part 281 is amended by adding a new § 281.201 to read as follows:

§ 281.201 Purpose.

The purpose of this subpart is to implement section 401 of the NGPA in order to provide that effective November 1, 1979, the curtailment plans of interstate pipelines protect, to the maximum extent practicable, deliveries of natural gas for essential agricultural uses and for high-priority uses in accordance with the provisions of this subpart.

§ 281.202 Applicability.

This subpart applies to the following interstate pipelines:

Alabama-Tennessee Pipeline Company
Algonquin Gas Transmission Company
Arkansas Louisiana Natural Gas Company
Cities Service Gas Company
Colorado Interstate Gas Company
Columbia Gas Transmission Corporation
Consolidated Gas Supply Corporation
East Tennessee Natural Gas Company
Eastern Shore Natural Gas Company
El Paso Natural Gas Company
Florida Gas Transmission Company

Great Lakes Gas Transmission Company
Inter-City Minnesota Pipelines, Ltd., Inc.
Kansas-Nebraska Natural Gas Company, Inc.
Lawrenceburg Gas Transmission Company
Michigan-Wisconsin Pipeline Company
Mid-Louisiana Gas Company
Midwestern Gas Transmission Company
Mississippi River Transmission Company
Montana Dakota Utilities Company
National Fuel Gas Supply Company
North Penn Gas Company
Northern Natural Gas Company
Northwest Pipeline Corporation
Panhandle Eastern Pipeline Company
South Georgia Natural Gas Company
Southern Natural Gas Company
Southwest Gas Corporation
Tennessee Gas Pipeline Company, a Division of Tenneco, Inc.
Tennessee Natural Gas Lines
Texas Eastern Transmission Corporation
Texas Gas Transmission Corporation
The Inland Gas Company
Transcontinental Gas Pipeline Corporation
Transwestern Pipeline Company
Trunkline Gas Company
United Gas Pipe Line Company
Western Gas Interstate Company

§ 281.203 Definitions and cross references.

(a) Definitions. For purposes of this subpart:

(1) "Direct sale customer" means an essential agricultural user of high priority

user which purchases natural gas directly from an interstate pipeline and consumes such natural gas for a high-priority use or an essential agricultural use.

(2) "Essential agricultural use" means any use of natural gas which is certified by the Secretary of Agriculture as an "essential agricultural use" under section 401(c) of the NGPA, as identified in 7 C.F.R. §2900, et seq.

(3) "Essential agricultural user" means a person who uses natural gas for an essential agricultural use.

(4) "High-priority use" means any use of natural gas which qualifies the users as a high-priority user.

(5) "High-priority user" means any person who uses natural gas:

(i) in a residence;

(ii) in a small commercial establishment;

(iii) in a school or a hospital; or

(iv) for police protection, for fire protection, in a sanitation facility or a correctional facility.

(6) "End-use curtailment plan" means a provision in the tariff of an interstate pipeline that requires that under circumstances of supply shortage natural gas deliveries will be curtailed based at least in part upon factors which consider the end-use of the natural gas.

(7) "Indirect sale customer" of an interstate pipeline means an essential agricultural end-user served by a local distribution company which is served directly by the interstate pipeline.

(8) "Residence" means a dwelling using natural gas predominantly for residential purposes such as space heating, air

conditioning, hot water heating, cooking, clothes drying, and other residential uses and includes apartment buildings and other multi-unit buildings.

(9) "Small commercial establishment" means any establishment (including institutions and local, state and Federal Government agencies) engaged primarily in the sale of goods or services where natural gas is used:

(i) in amounts of less than 50 Mcf on a peak day; and

(ii) for purposes other than those involving manufacturing or electric power generation.

(10) "Hospital" means a facility, the primary function of which is delivering medical care to patients who remain at the facility including nursing and convalescent homes. Outpatient clinics or doctors' offices are not included in this definition.

(11) "School" means a facility, the primary function of which is to deliver instruction to regularly enrolled students in attendance at such facility. Facilities used for both educational and noneducational activities are not included under this definition unless the latter activities are merely incidental to the delivery of instruction.

(12) "Local distribution company" means a local distribution company served directly by an interstate pipeline.

(13) "Rolling base period" means a time period in which entitlements of the customers of an interstate pipeline are established pursuant to the pipeline's currently effective curtailment plan and which is periodically updated to reflect recent gas requirements of such customers.

(14) "Entitlements" of a direct sale customer or a local distribution company

customer with respect to a particular interstate pipeline means the amount of natural gas that customer is permitted to receive under the interstate pipeline's currently effective curtailment plan.

(15) "Interstate pipeline purchaser" means an interstate pipeline which received deliveries of natural gas from another interstate pipeline.

(16) "Alternate fuel" means any fuel which is

(i) economically practicable and reasonably available as an alternate to natural gas for use in a boiler fuel facility; and

(ii) may be burned in the boiler fuel facility without placing the boiler fuel in violation of any applicable Federal, state or local air pollution control standards.

(17) "Currently effective curtailment plan" of an interstate pipeline means that curtailment plan in effect on March 1, 1979.

(b) Cross references.

(1) Essential agricultural requirements are calculated in accordance with § 281.208.

(2) "Index of entitlements" is that index of entitlements prepared in accordance in § 281.204(b).

§ 281.204 Tariff filing requirements.

(a) General rule. Each interstate pipeline listed in § 281.202 shall file tariff sheets, including an index of entitlements, which provides that if the interstate pipeline is in curtailment, natural gas will be delivered in accordance with the provisions of this subpart. If the interstate pipeline has curtailment provisions in its currently effective tariff, the tariff sheets shall amend the existing curtailment provisions. If the interstate pipeline has no curtailment plan in its currently effective tariff, when it files tariff sheets to

amend its currently effective tariff to include a curtailment plan such curtailment plan shall comply with the requirements of this subpart. The tariff sheets shall be filed no later than October 1, 1979, with a proposed effective date of November 1, 1979. The Data Verification Committee report prepared in accordance with § 281.213 shall be filed with the tariff sheets.

(b) Index of entitlements. (1) The index of entitlements for an interstate pipeline shall identify the natural gas entitlements in priority of service category 1 and 2 (established in accordance with § 281.205(a)) for each direct sale customer, each local distribution company customer and each interstate pipeline purchaser on a daily, monthly, seasonal or other periodic basis used in the currently effective curtailment plan.

(2) Periodic update. Each interstate pipeline shall update its index of entitlements annually to reflect changes in Priority 2 entitlements. The new index of requirements shall be filed on October 1 of each year with a proposed effective date of November 1, except that if the interstate pipeline uses a rolling base period in its currently effective curtailment plan it shall file its new index of entitlements on the date upon which other end-uses of the customer's of the interstate pipeline are updated in accordance with the currently effective tariff.

(iii) Alternate fuel determination. Immediately upon notification that the Commission has determined (under Subpart C) that an essential agricultural user has alternate fuel for priority 2 entitlements, it shall amend its index of entitlements to remove such volumes from priority 2 and to the extent such volumes were reflected in

the curtailment plan in effect on October 31, 1979, shall place such volumes in the priority of service category where they would have been included except for the priority 2 classification.

(c) Other tariff provisions. (1) Every tariff filed under this subpart shall contain provisions that will require the interstate pipeline:

(i) to provide for deliveries of sufficient volumes of natural gas to respond to emergency situations (including environmental emergencies) during periods of curtailment where additional supplies are required to forestall irreparable injury to life or to property; and

(ii) to provide for deliveries of sufficient volumes of natural gas to provide for minimum plant protection when the plant is shut down.

(2) Volumetric delivery requirements. Notwithstanding any other provisions of this subpart, an interstate pipeline which is delivering natural gas in accordance with this subpart shall not be required to deliver to any customer volumes of natural gas on a daily, monthly, seasonal or other periodic basis which exceed the volumes of natural gas that the interstaet pipeline may deliver to such customer without causing the interstate pipeline to violate any daily, monthly, seasonal or other periodic volumetric limitations established in the contract between the interstate pipeline and such customer.

§ 281.205 General rules.

(a) Priority of service categories.

(1) Priority 1. Each interstate pipeline shall establish a new high-priority use category of service designated priority one (1) which shall include all the high-

priority entitlements calculated in accordance with § 281.206 and those storage injection volumes calculated in accordance with paragraph (c)(2).

(2) Priority 2. Each interstate pipeline shall establish a new priority of service category designated priority two (2) which shall include all the essential agricultural use requirements calculated in accordance with § 281.207 and those storage injection volumes calculated in accordance with paragraph (c)(2).

(3) Other priority of service categories. Each interstate pipeline may retain the priority of service categories in its currently effective tariff, but such categories shall be placed at priorities below the new priority 1 and 2. Each interstate pipeline shall reduce the entitlements in all other existing categories of service to the extent such entitlements have been

placed into the new priority of service categories 1 or 2.

(b) Method of curtailment. All deliveries to all customers of the interstate pipeline for all volumes of natural gas not included in priority 1 and 2 shall be fully curtailed by the interstate pipeline before priority 1 and 2 entitlements are curtailed. Deliveries for priority 2 entitlements shall be fully curtailed by the interstate pipelines (in accordance with the currently effective curtailment plan) before priority 1 entitlements are curtailed by the interstate pipelines.

(c) Storage. (1) General rule. Interstate pipelines shall classify customer storage injection volumes in the same manner as that used in the currently effective curtailment plan.

(2) Storage sprinkling. Interstate pipelines which classify customer storage

injection volumes on the basis of the actual end-use of the natural gas shall recalculate storage injection volumes placed in each priority of service category based upon the index of entitlements to be filed on October 1.

(3) Other treatment of storage. Except as provided in paragraph (c)(2), no interstate pipeline shall recalculate or reclassify any customer storage injection volumes, and no customer storage injection volumes shall be included as priority 1 or 2 entitlements.

§ 281.206 Priority 1 reclassification.

(a) Definitions. For purposes of this section "high-priority entitlements" means, with respect to a particular interstate pipeline,

(1) in the case of a direct sale customer, the volume of natural gas such direct sale customer is entitled to receive for

high-priority uses (as defined in § 281.203) under the currently effective curtailment plan of the interstate pipeline;

(2) in the case of a local distribution company, the volume of natural gas which such local distribution company is entitled to receive on account of the high-priority uses (as defined in § 281.203) of its high-priority user customers under the currently effective curtailment plan of the interstate pipeline;

(3) in the case of an interstate pipeline purchaser the volume of natural gas such interstate pipeline purchaser is entitled to receive from an interstate pipeline supplier for the high-priority entitlements of its direct sale customers, local distribution company customers and interstate pipeline customers.

(b) Direct sale customer and local distribution company customers. (1)(i) Subject to subparagraph (b)(2), and § 281.211 each direct sale customer may request each of its direct interstate pipeline suppliers to reclassify its high-priority entitlements in its currently effective curtailment plan as priority 1 entitlements.

(ii) Subject of subparagraph (b)(2), and § 281.211 each local distribution company must request each of its direct interstate pipeline suppliers to reclassify its high priority entitlements in its currently effective curtailment plan in priority 1 entitlements.

(2) The direct sale customer or local distribution company customer shall designate the entitlements in each priority of service category in the currently effective curtailment plan for which priority 1 reclassification is requested. It shall request

that those entitlements for which priority 1 reclassification is requested be excluded from the category of service in which they are included in the currently effective plan.

(3) Subject to § 281.210, the interstate pipeline shall reclassify all such high-priority entitlements as priority 1 entitlements and shall reduce by an equal amount the entitlements in such other priority of service categories as designated by the direct sale customer or local distribution company customer, (in accordance with subparagraph (2)).

(c) Interstate pipelines. (1) Subject to subparagraph (b)(2), and § 281.211 an interstate pipeline purchaser may request each of its direct interstate pipeline suppliers to reclassify its high-priority entitlements in its currently effective curtailment plan (equal to the attributed priority 1

entitlements calculated in accordance with § 281.209) as priority 1 entitlements in the currently effective curtailment plan of the interstate pipeline supplier.

(2) the interstate pipeline purchaser shall designate the entitlements in each priority of service category in the currently effective curtailment plan for which priority 1 reclassification is requested. It shall request that those entitlements for which priority 1 classification is requested be excluded from the category of service in which they are included in the currently effective plan.

(3) Subject to § 281.210, the interstate pipeline supplier shall reclassify all such high-priority entitlements as priority 1 entitlements and shall reduce the high-priority entitlements in other priority of service categories as designated by the

interstate pipeline customer, (in accordance with subparagraph (2)).

§ 281.207 Priority 2 classification.

(a) Direct sale customer. (1) Subject to subparagraph (a)(2), and § 281.211 a direct sale customer may request each of its direct interstate pipeline suppliers to classify its essential agricultural requirements (calculated in accordance with § 281.208) as priority 2 entitlements.

(2) The essential agricultural user shall designate the entitlements in each priority of service category in the currently effective curtailment plan which reflect the essential agricultural requirements. It shall request that entitlements which are reflected in priority of service categories in the currently effective curtailment plan are removed from such priority of service categories.

(3) Subject to § 281.210, the interstate pipeline shall classify all such essential agricultural requirements as priority 2 entitlements and reduce the entitlements in such other priority of service categories as designated by the direct sale customer, (in accordance with subparagraph (2)).

(b) Indirect sale customer. Subject to §281.211 an indirect sale customer which is an essential agricultural user may ask each of its local distribution company direct suppliers to request each interstate pipeline supplier to classify the indirect essential agricultural requirements as priority 2 entitlements.

(c) Local distribution companies. (1) The local distribution company shall attribute (in accordance with §281.209) the indirect essential agricultural requirements for which reclassification is sought under paragraph (b) to its direct interstate

pipeline suppliers. Subject to subparagraph (b)(2), and § 281.211 the local distribution company shall request each of its direct interstate pipeline suppliers to classify the attributed indirect essential agricultural requirements as priority 2 entitlements.

(2) The local distribution company shall designate the entitlements in each priority of service in the currently effective curtailment plan which reflect the attributed indirect essential agricultural requirements. It shall request that those entitlements which are reflected in each category in the currently effective curtailment plan are removed from such priority of service category.

(3) Subject to § 281.210, the interstate pipeline shall classify all such attributed indirect essential agricultural requirements as priority 2 entitlements and shall reduce the entitlements of the local

distribution company in such other priority of service categories as designated by the local distribution company, (in accordance with subparagraph a(b)).

(d) Interstate pipeline. (1) Subject to subparagraph (d)(2), and § 281.211 an interstate pipeline purchase may request each of its direct interstate pipeline suppliers to classify the attributed priority 2 entitlements (calculated under § 281.209) as priority 2 entitlements in the currently effective curtailment plan of the interstate pipeline supplier.

(2) The interstate pipeline purchaser shall designate the entitlements in each priority of service category in the currently effective curtailment plan of the interstate pipeline supplier which reflects the attributed priority 2 entitlements and request that those entitlements which are reflected in such priority of service

categories in the currently effective curtailment plan are removed from such priority of service category.

(3) Subject to § 281.210, the interstate pipeline supplier shall classify the attributed priority 2 entitlements as priority 2 entitlements and shall reduce the entitlements of the interstate pipeline purchaser in such other priority of service categories as designated by the interstate pipeline purchaser, (in accordance with subparagraph (2)).

§ 281.208 Calculation of essential agricultural requirements and attributable priority 2 entitlements.

(a) Scope. This section sets forth the method by which:

(1) an essential agricultural user calculates total essential agricultural requirements, direct essential agricultural requirements, and indirect essential agricultural requirements;

(2) a local distribution company calculates attributable indirect essential agricultural requirements for its essential agricultural user customers; and

(3) an interstate pipeline purchaser calculates it attributable priority 2 entitlements.

(b) Calculation by an essential agricultural user.

(1) Total essential agricultural requirements.

(i) General Rule. (A) The essential agricultural requirements of an essential agricultural user are those volumes (expressed in daily, monthly, seasonal or other appropriate periodic volumes) designated by the Secretary of Agriculture and calculated in accordance with 7 C.F.R. § 2900.4; less

(B) Any volumes for which the Commission determines, in accordance with Section 401(b) of the NGPA, that the essential agricultural user has alternate fuel.

(ii) Definitions. Current requirements as used in 7 C.F.R. Part 2900 means the lesser of

(A) the energy consumption from the most recent 12 month period for which actual data is available, with necessary adjustments; or

(B) the maximum volume of natural gas for which the essential agricultural user has installed capability to use for essential agricultural uses.

(2) Attribution of total essential agricultural requirement and indirect essential agricultural requirements.

(i) The essential agricultural user shall attribute its total essential agricultural requirements among all its sources of supply of natural gas in accordance with § 281.209.

(ii) The direct essential agricultural requirement with respect to a particular interstate pipeline supplier is that part of

the total essential agricultural requirements attributed under § 281.209 to the direct interstate pipeline supplier. The indirect essential agricultural requirement with respect to a particular local distribution company supplier is that part of the total essential agricultural requirements attributed under § 281.209 to a direct local distribution company supplier.

(c) Calculation by local distribution companies.

(1) A local distribution company shall attribute under § 281.209 the indirect essential agricultural requirements of each of its essential agricultural user customers (calculated under paragraph (b)(2) of this section) among all the interstate pipelines which are direct suppliers of the local distribution company.

(2) That part of the indirect essential agricultural requirements which the local

distribution company attributes to a particular interstate pipeline supplier is the attributed indirect essential agricultural requirements attributed to that interstate pipeline.

(d) Interstate pipelines.

(1) An interstate pipeline purchaser may attribute under § 281.209 the priority 2 entitlements it includes in its index of entitlements among its direct interstate pipelines suppliers.

(2) The attributable priority 2 entitlements attributed to a particular interstate pipeline supplier is that part of the priority 2 entitlements of the interstate pipeline purchaser which it attributes to a particular interstate pipeline supplier.

§ 281.209 Attribution.

(a) Applicability. (1) This section sets forth the rules for attributing total essential agricultural requirements by an

essential agricultural user, indirect essential agricultural requirements of an essential agricultural user by its local distribution company supplier and priority 1 and 2 entitlements by an interstate pipeline purchaser.

(2) This section does not apply to an essential agricultural user or local distribution company which receives all its natural gas supplies from a single source, or an interstate pipeline purchaser which does not receive natural gas from any other interstate pipeline.

(b) Natural gas supplies included for purposes of attribution. (1) For purposes of attribution in accordance with this section, natural gas from all direct sources, including but not limited to pipeline production, production by independent producers, production by affiliates, SNG facilities and natural gas purchased from

local distribution companies, and interstate pipelines shall be included.

(2)(i) An essential agricultural user, which attributes under paragraph (d) a portion of the volumes which are its total essential agricultural requirements to a direct source of natural gas other than a direct supplier may not seek classification to priority 2 under § 281.207 for such portion of its total essential agricultural requirements.

(ii) A local distribution company which attributes under paragraph (e) a portion of the volumes which are its indirect essential agricultural requirements to a direct source of natural gas other than a direct supplier may not seek classification to priority 2 under § 281.207 for such portion of its indirect essential agricultural requirements.

(iii) An interstate pipeline purchaser which attributes under paragraph (f) a portion of the volumes of its priority 1 or 2 entitlements to a direct source of natural gas other than a direct supplier may not seek reclassification to priority 1 or classification to priority 2, respectively, for such portion of its priority 1 and 2 entitlements

(c) Definitions. For purposes of this section:

(i) "Direct supplier" means, with respect to an essential agricultural user, an interstate pipeline or local distribution company which directly supplies such essential agricultural user, with respect to a local distribution company, an interstate pipeline which directly supplies such local distribution company and, with respect to an interstate pipeline purchaser, an

interstate pipeline which directly supplies the interstate pipeline purchaser.

(ii) "Base period" of a direct supplier means the fixed historical period in which entitlements of the customer of the direct supplier were established for purposes of the currently effective curtailment plan of such direct supplier.

(iii) "Annual quantity entitlements" with respect to a particular direct supplier means the total entitlements an essential agricultural user, local distribution company or interstate pipeline is entitled to purchase from that direct supplier in a calendar year under the currently effective curtailment plan.

(d) Essential agricultural user.

(1) An essential agricultural user shall calculate its attributable essential agricultural requirements attributable to a particular direct supplier by multiplying

its total essential agricultural requirements by the annual quantity entitlements from such direct supplier and dividing the product by the total volume of natural gas received from all sources during the base period of the direct supplier's currently effective curtailment plan.

(2) If an essential agricultural user does not have annual quantity entitlements only with respect to one of its direct suppliers, the attributable essential agricultural requirements attributable to such direct supplier shall be that part of the total essential agricultural requirements not attributed under subparagraph (1).

(3) If an essential agricultural user does not have annual quantity entitlements with respect to more than one of its direct suppliers the attributable essential agricultural requirements attributable to a particular direct supplier shall be calculated

by multiplying the portion of total essential agricultural requirements not attributed to direct suppliers under subparagraph (1) by the total volume of natural gas received from such supplier in 1972 and dividing the product by the total supplies of natural gas received from all sources in 1972.

(e) Local distribution company. A local distribution company shall calculate its attributable indirect essential agricultural requirements to a particular direct supplier by multiplying its indirect essential agricultural requirements by the annual quantity entitlements from such direct supplier and dividing the product by the total volume of natural gas received from all sources during the base period of the direct supplier's currently effective curtailment plan.

(f) Interstate pipelines. An interstate pipeline purchaser shall attribute priority 1 and 2 entitlements respectively to a particular direct supplier by multiplying its total priority 1 and 2 entitlements respectively by the annual quantity entitlements from such direct supplier and dividing the product by the total volume of natural gas received from all sources during the base period of the direct supplier's currently effective curtailment plan.

§ 281.210 Conflicting data.

(a) Interstate pipelines. Notwithstanding any other provision of this subpart, if the records of an interstate pipeline contain information which directly conflicts with a request for reclassification of priority 1 entitlements under § 281.206 or classification of priority 2 entitlements under §281.207, the interstate pipeline may

not include such volumes in priority 1 or 2 of its index of entitlements.

(b) Local distribution companies. Notwithstanding the provisions of § 281.207(c), if the records of a local distribution company contain information which directly conflicts with a request from an essential agricultural user to have the local distribution company to seek classification of volumes in priority 2, the local distribution company may not seek classification for such volumes.

§ 281.211 Filing and documentation.

(a) Priority 1.

(1) Direct sales customers and local distribution companies.

(i) Each request of a direct sale customer and local distribution company customer for reclassification of high-priority entitlements (as defined in § 281.206) to priority 1 entitlements shall be made in

writing no later than June 15, 1979, and shall be accompanied by the data described in clause (ii).

(ii)(A) A table indicating high-priority entitlements (as defined in §281.206) and the end-use of the natural gas in each priority of service category in the currently effective curtailment plan for which priority 1 reclassification is requested.

(B) A copy of the end-use data used to establish the high-priority requirements and designated end-use of the natural gas.

(2) Interstate pipelines.

(i) Each interstate pipeline purchaser which reclassifies high-priority requirements of its customers as priority 1 entitlements may request that its high-priority requirements in the currently effective curtailment plan of its interstate pipeline suppliers (equal to the attributable priority 1 entitlements) be reclassified as

priority 1 entitlements. Such requests shall be made in writing no later than July 15, 1979 and shall be accompanied by the data described in clause Iii).

(ii)(A) A table indicating high-priority entitlements (as defined in § 281.206) and end-use of the natural gas in each priority of service category in the currently effective curtailment plan of the interstate pipeline supplier for which priority 1 reclassification is requested.

(B) A copy of the end-use data used to establish the high-priority requirements and designated end-use of the natural gas.

(C) A table indicating the volumes and priority of service categories for which each of direct sale customers and local distribution company customers sought reclassification to priority 1.

(b) Priority 2.

(1) Essential agricultural users.

(i) Each request for classification of essential agricultural requirements as priority 2 entitlements shall be made in writing to the local distribution company supplier or the direct interstate pipeline supplier, as appropriate, no later than June 15, 1979, and shall set forth all calculations made in accordance with this subpart.

(ii) The request shall be accompanied by a statement that;

(A) Indicates the intended end-use(s) and volume(s) of the natural gas for which priority 2 entitlements are requested.

(B) Indicates the SIC Code activities of the essential agricultural user which qualifies it as an essential agricultural user in accordance with 7 C.F.R. § 2900.3.

(C) Includes the data and calculations used to determine essential agricultural requirements under 7 C.F.R. § 2900.4.

(D) Includes, with respect to any essential agricultural user to which Subpart C applies gas for boiler fuel use in a boiler fuel facility which is capable of using more than 300 Mcf of natural gas on a peak day, a copy of its petition for alternate fuel determination (which is required to be filed with the Commission under Subpart C,) with confidential information deleted.

(iii) The statement under clause (ii) shall be signed by a responsible official of the essential agricultural user. Such official shall swear or affirm that the statements are true to the best of his information, knowledge and belief.

(2) Local distribution companies.

Each request for classification of essential agricultural requirements as

priority 2 requirements shall be made in writing to the direct interstate pipeline supplier no later than June 30, 1979, and shall set forth all calculations made in accordance with this subpart and all copies of all requests received from its essential agricultural uses under subparagraph (1).

(3) Interstate pipelines.

Each request of an interstate pipeline purchaser for classification of attributable priority 2 entitlements as priority 2 entitlements shall be made in writing to the direct interstate pipeline supplier no later than July 15, 1979, and shall set forth all calculations made in accordance with this subpart and shall include copies of all requests of essential agricultural users and local distribution companies under subparagraphs (1) and (2).

(4) Subsequent request. For years subsequent to 1979, the data required by

this paragraph must be filed only to the extent a change in priority 2 entitlements is sought. The filing dates are those prescribed in this paragraph, except than an interstate pipeline with a rolling base period may prescribe different dates as appropriate.

§ 281.212 Draft tariff sheets and index of entitlements.

(a) Each interstate pipeline shall prepare draft tariff sheets and a draft index of entitlements in accordance with this subpart.

(b) The draft tariff sheets and index of entitlements shall be served on all customers of the interstate pipeline no later than August 1, 1979.

(c) Copies of all documents received by the interstate pipeline under § 281.210, the draft tariff sheets and the draft index of entitlements shall be served on the Data

Verification Committee no later than August 1, 1979.

(d) For years subsequent to 1979, the documents required to be served under this section, must be served on August 1, except that an interstate pipeline with a rolling base period may prescribe different dates, as appropriate.

§ 281.213 Data Verification Committee.

(a) Each interstate pipeline shall establish a Data Verification Committee no later than August 1, 1979. It shall include, at a minimum, a representative of the interstate pipeline, Commission staff, a large and small local distribution company, and an essential agricultural user. The appropriate state and local regulatory bodies, and a representative of the United States Department of Agriculture may, at their option, be members.

(b) The Data Verification Committee shall review all calculations behind the draft tariff sheets and the proposed index of entitlements. The Data Verification Committee may request, and the interstate pipeline shall immediately supply, any information requested by the Data Verification Committee.

(c) Any customer of the interstate pipeline may file a written protest concerning the index of entitlements. Such protests shall be filed with the Data Verification Committee no later than August 24, 1979.

(d) The Data Verification Committee shall review the draft tariff sheets and index of entitlements and shall review the underlying data for uniformity in preparation.

(e) The Data Verification Committee shall prepare a report concerning the proposed index of requirements and the draft tariff sheets for the interstate pipeline.

It shall, at a minimum, specify all arithmetic errors and contain an evaluation of all protests. It may contain a proposed settlement of contested draft tariff sheets. The report shall be submitted to the interstate pipeline no later than September 23, 1979.

§ 281.214 Notice, complaint and remedy.

(a) Complaint. Any direct sale customer or local distribution company aggrieved by any alleged violation of this subpart may file, within 45 days of notice, a complaint pursuant to § 1.6 of this chapter.

(b) Remedy. If the Commission determines that a violation of this subpart has occurred, it shall take whatever action it deems appropriate in the circumstances. Such action may include payback, in kind or in dollars, by the person benefitting from the violation.

§ 281.215 Additional relief.

If an interstate pipeline rejects (under § 281.210 or otherwise) a request for reclassification under § 281.206 or classification under § 281.207 or if a local distribution company does not request (for any reason including the provisions of § 281.210) classification under § 281.206 on behalf of its high priority uses or reclassification on behalf of its essential agricultural users, the person aggrieved by such action may file a request for relief from curtailment under § 1.7 of the Commission Regulations. The request shall contain the information required in § 2.78(b) of the Commission Regulations.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

(18 C.F.R. §§ 281.211 and 281.212)

Before Commissioner:
Don S. Smith, Acting Chairman;
Georgiana Sheldon, and Matthew
Holden, Jr.

Amendments to the Regulation for the Implementation of Section 401 of the Natural Gas Policy Act	)	Docket No. RM79-15

ORDER NO. 29-A
FINAL RULE
(Issued June 15, 1979)

BACKGROUND

On May 2, 1979, the Federal Energy Regulatory Commission ("Commission") issued a permanent curtailment rule (44 Fed. Reg. 26855, May 8, 1979) which established a system of high-priority [Priority 1] and essential agricultural [Priority 2] use requirements and integrated them into the curtailment plans of interstate pipelines. This new rule requires the reordering of

curtailment priorities by November 1, 1979 and applies this treatment to deliveries of natural gas beginning on that date. The new rule requires considerable data gathering and reporting by end-users, distributors and interstate pipelines. Under § 281.211(b) of the new regulations essential agricultural users which seek Priority 2 treatment for their agricultural requirements of natural gas are required to file a request for Priority 2 treatment with all direct suppliers by June 15, 1979. Local distribution companies must review and forward these requests to their interstate pipeline suppliers by June 30, 1979 (§ 281.211(c)) and, if the pipeline purchases gas from downstream pipelines it must request reclassification of its Priority 2 entitlements from its supplier by July 15, 1979 (§ 281.211(d)). Similarly, direct sale customers and local distribution companies must report Priority 1

requirements to their direct suppliers no later than June 15, 1979. Interstate pipelines must report Priority 1 entitlements to their upstream suppliers by July 15, 1979. Under § 281.212, the interstate pipelines must then file draft tariff sheets and an index of entitlements with the Data Verification Committee ("DVC") and distribute these documents to customers. The DVC has from August 1 to September 23 to review the tariff sheets, index of requirements and the back-up data therefor.

On May 14, 1979 the United States Department of Agriculture ("USDA") issued its permanent rule establishing essential agricultural volumetric requirements. 44 Fed. Reg. 28782 (May 17, 1979). That rule modified the interim rule and determined that all essential agricultural users were entitled to one hundred (100%) percent of current requirements to meet their essential

agricultural needs. The permanent curtailment rule incorporates the USDA rule -- as well as its amendment of May 14, 1979 -- by reference. Consequently, under the Commission's permanent curtailment rule all essential agricultural users, as defined by USDA, are entitled to request current requirements for their essential agricultural uses.[1]

The Commission rule preceded the final USDA rule, and possibly there has been some confusion concerning the fact that the permanent curtailment rule incorporates the changes in the USDA rule. As noted previously, it does.

It has come to the attention of the Commission and the Department of Agriculture

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1/ Under the attribution provisions of § 281.209, in certain circumstances, a portion of essential agricultural requirements of a particular essential agricultural user may not be attributed to interstate pipeline suppliers.

that many essential agricultural users have not become aware of the need to request Priority 2 classification by June 15, 1979.

It is essential that all requests for essential agricultural requirements be received by the local distributor before it reports its customer's requirements to its pipeline suppliers. Also, pipelines need the complete data before they can report to their upstream suppliers and prepare their index of requirements. Thus, if farmers or other essential agricultural users fail to petition their suppliers for priority treatment of their gas supplies by June 15, 1979, they may be foreclosed from the benefits that Congress intended to provide such users in terms of receiving natural gas in preference to all but high-priority users. Therefore, the Commission believes it would be advisable to extend by 30 days, to July 15,

1979, the date by which essential agricultural users must file requests with local suppliers. Since the compilation and transmittal of requests for Priority 2 status by local distribution companies and interstate pipeline suppliers depends on the initial filing by essential agricultural users themselves, the filing dates for these entities should likewise be extended. The dates for filing of Priority 1 data are also extended. However, the Commission believes it is important that to the maximum extent practicable the new curtailment plans be in place by November 1, 1979, in time for the winter heating season. Accordingly, no similar extension will be given to the DVCs. Rather the actual time given the DVCs will be shortened: they will receive the documents on August 30, 1979 and are scheduled to submit their report on September 23, 1979. However, the dates for filing protests with the DVC

are extended. The Commission recognizes the possibility that the DVCs may need more than 3 weeks to review the data and if severe problems of timing arise either for a particular DVC or for all DVCs more time may have to be allotted to the DVCs.

SECTION-BY-SECTION ANALYSIS

The amendments in this rulemaking advance the filing dates in § 281.211(a) and (b) by approximately one month. Paragraph (a) is changed in clause (i) of subparagraph (1) by extending the filing date from June 15, 1979 to July 15, 1979. Paragraph (a) is changed in clause (i) of subparagraph (2) by extending the filing date from July 15, 1979 to August 15, 1979. Paragraph (b) is changed in clause (i) of subparagraph (1) by extending the filing date for essential agricultural users from June 15, 1979 to July 15, 1979, in subparagraph (2) by extending the filing date for local

distribution companies to July 30, 1979, and in subparagraph (3) by extending the date for requesting reclassification of entitlements by interstate pipeline purchasers to August 15, 1979.

Section 281.212 is changed in paragraphs (b) and (c) to provide an additional month, until August 30, 1979, for pipelines to serve indices of entitlement and draft tariff sheets.

EFFECTIVE DATE

Section 553(d) of the Administrative Procedure Act requires that publication of a rule be made not less than 30 days before its effective date unless inter alia a rule relieves a restriction or the agency finds good cause for more expeditious action. The amendments to § 281.211 and § 281.212 are intended to make it possible for essential agricultural users to exercise their rights to priority treatment of certain gas

supplies. In order that the intent of Congress that essential agricultural users be protected from curtailment of natural gas is carried out, the Commission believes that the June 15, 1979, deadline must be extended. Because the date is imminent, the Commission finds good cause to make the amendments to Part 281 effective immediately.

(Natural Gas Policy Act of 1978, P.L. 95-621. Department of Energy Organization Act, 42 U.S.C. § 7107 et seq.; E.O. 12009, 42 Fed. Reg. 46267; Administrative Procedure Act, 5 U.S.C. § 551 et seq.)

In consideration of the foregoing, Subpart B, Part 281, Chapter 1, Title 18 of the Code of Federal Regulations is amended as set forth below, effective immediately.

BY THE COMMISSION

(S E A L)

Kenneth F. Plumb
Secretary

1. Section 281.211 is amended in paragraph (a)(1)(i) by deleting the date "June 15, 1979" and inserting in lieu thereof "July 15, 1979."

2. Section 281.211 is amended in paragraph (a)(2)(i) by deleting the date "July 15, 1979" and inserting in lieu thereof "August 15, 1979."

3. Section 281.211 is amended in paragraph (b)(1)(i) by deleting the date "June 15, 1979" and inserting in lieu thereof "July 15, 1979."

4. Section 281.211 is amended in paragraph (b)(2) by deleting the date "June 30, 1979" and inserting in lieu thereof "July 30, 1979."

5. Section 282.211 is amended in paragraph (b)(3) by deleting the date "July 15, 1979" and inserting in lieu thereof "August 15, 1979."

6. Section 281.212 is amended in paragraphs (b) and (c) by deleting the date "August 1, 1979" where it appears and inserting in lieu thereof "August 30, 1979."

7. Section 281.213 is amended in paragraph (c) by deleting the date "August 24, 1979" and inserting in lieu thereof "September 14, 1979."

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners:
Charles B. Curtis, Chairman; Matthew Holden, Jr., and George R. Hall.

Amendments to the Regulation for the Implementation of Section 401 of the Natural Gas Policy Act	)	Docket No. RM79-15

ORDER NO. 29-B
FINAL RULE
(Issued July 20, 1979)

BACKGROUND

On May 2, 1979, the Federal Energy Regulatory Commission ("Commission") issued a permanent curtailment rule (44 Fed. Reg. 26855, May 8, 1979) which established a system of high-priority [Priority 1] and essential agricultural [Priority 2] use requirements and integrated them into the curtailment plans of interstate pipelines. This new rule requires the reordering or curtailment priorities by November 1, 1979 and

applies this treatment to deliveries of natural gas beginning on that date. The new rule requires considerable data gathering and reporting by end-users, distributors and interstate pipelines. Under § 281.211(b) of the new regulations, essential agricultural users which seek Priority 2 treatment for their agricultural requirements of natural gas are required to file a request for Priority 2 treatment with their direct suppliers. Local distribution companies have two weeks to review and forward these requests to their interstate pipeline suppliers (§ 281.211(c)) and, if the pipeline purchases gas from downstream pipelines, it must request reclassification of its Priority 2 entitlements from its supplier, within two weeks of receiving information from its customers (§ 281.211(d)). Similarly, direct sale customers and local distribution companies must report Priority 1 requirements to

their direct suppliers. Interstate pipelines must report Priority 1 entitlements to their upstream suppliers. Under § 281.212, the interstate pipelines must then file draft tariff sheets and an index of entitlements with the Data Verification Committee ("DVC") and distribute these documents to customers. The DVC must then review the tariff sheets, index of requirements, and the back-up data therefor. On October 1, 1979, the interstate pipelines must file new tariff sheets which implement the permanent curtailment plan protecting high priority and essential agricultural users.

On June 15, 1979, the Commission extended for 30 days the deadline for filing requests for Priority 1 and 2 treatment. Order 29-A (44 Fed. Reg. 37499, June 27, 1979). Under the amended rule, essential agricultural users had until July 15, 1979, to request Priority 2 treatment.

On July 10, 1979, the High Plains Gas Consumer Group et al ("HPGC")[1] filed a motion for an extension of time which would postpone for two weeks, until July 31, 1979, the date by which essential agricultural users must file a request for Priority 2 treatment for natural gas to meet their essential agricultural requirements. HPGC alleges that a large number of on-farm users in the Kansas, Oklahoma, and Texas areas are unaware of the July 15 deadline for requesting Priority 2 treatment. A significant factor contributing to the alleged lack of information is that this is the season for peak agricultural

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1/ HPGC et al includes High Plains Consumer Group, Texas County Irrigation & Water Resources Association of Gyumon, OK, American Agriculture Movement of Oklahoma, with State headquarters in Oklahoma City (AAM), Sherman County Agribusiness Energy Users Association of Stratford, Tx., Beaver County Irrigation Association of Beaver, OK, and Cimarron County Irrigation Association of Boise City, OK.

activity and harvesting, keeping many farmers in the field 16-18 hours on many days.

The Commission recognizes that the permanent curtailment plan which is extended to give a preference to essential agricultural requirements in the curtailment plans of interstate pipelines is a new plan based upon a new statute. It is possible that there is not yet general familiarity with this plan embodied in the permanent curtailment rule, even though it was first proposed in January of this year. (44 Fed. Reg. 3725, January 18, 1979). Public hearings were held throughout the country, including one in Amarillo, Texas, in March and April. Moreover, the permanent rule requiring the filing of data by essential agricultural users was issued by the Commission on May 2, 1979. (44 Fed. Reg. 26855, May 8, 1979).

Nonetheless, the Commission has determined that the two week extension should be

granted -- to further assure the broadest possible participation in the Priority 2 requests by essential agricultural users. However, the dates for local distribution companies and interstate pipelines to make their own requests for upgrading because of requests made for Priority 2 treatment by essential agricultural users must also be extended by two weeks to August 15 and 31 respectively, since those requests are dependent upon downstream (end-user) requirements. At this time, the Commission has determined that it will not amend the rule to provide an automatic postponement of the date for the filing of the tariff sheets under the permanent curtailment rule beyond the present October 1, 1979 date prescribed in § 281.204. However, this leaves only one month between the pipeline's receipt of data necessary to prepare the Index of Requirements and the filing of the tariff sheets,

and significantly shortens the time allowed the Data Verification Committee for consideration of the draft index of requirements. Accordingly, the Commission will allow for the waiver of the October 1, tariff filing for one month, to November 1, 1979 for any pipeline which notifies the Commission, through the Secretary, that the Data Verification Committee needs additional time for review of the draft sheets. Any pipeline electing to postpone implementation of its permanent curtailment plan for one month until December 1, 1979, must keep its interim plan in effect for the month of November. The Commission believes that each pipeline may best evaluate the advantages of postponement of the permanent curtailment plan for one month against the disadvantages of modifying its curtailment plan after the beginning of the winter heating season.

SECTION-BY-SECTION ANALYSIS

The amendments in this rulemaking advance the filing dates in § 281.211(a) and (b) by approximately two weeks. Paragraph (a) is changed in clause (i) of subparagraph (1) by extending the filing date from July 15, 1979 to July 31, 1979. Paragraph (a) is changed in clause (i) of subparagraph (2) by extending the filing date from August 15, 1979 to August 31, 1979. Paragraph (b) is changed in clause (i) of subparagraph (1) by extending the filing date for essential agricultural users from July 15, 1979 to July 31, 1979, in subparagraph (2) by extending the filing date for local distribution companies to August 15, 1979, and in subparagraph (3) by extending the date for requesting reclassification of entitlements by interstate pipeline purchasers to August 31, 1979.

Section 281.212 is changed in paragraphs (b) and (c) to provide an additional two weeks until September 14, 1979, for pipelines to serve indices of entitlement and draft tariff sheets.

Section 281.204 is amended to allow that a pipeline may elect to file its proposed tariff sheets on November 1, 1979 with a proposed effective date of December 1, 1979, if the pipeline (by modification of its tariff where appropriate) continues in effect for November 1979 the interim curtailment plan implemented in accordance with Subpart A. The election is executed by written notification of the election to the Secretary of the Commission.

EFFECTIVE DATE

Section 553(d) of the Administrative Procedure Act requires that publication of a rule be made not less than 30 days before its effective date unless inter alia a rule

relieves a restriction or the agency finds good cause for more expeditious action. The amendments to § 281.211 and § 281.212 are intended to make it possible for essential agricultural users to exercise their rights to priority treatment of certain gas supplies. In order that the intent of Congress that essential agricultural users be protected from curtailment of natural gas is carried out, the Commission believes that the July 15, 1979, deadline must be extended. The Commission finds good cause to make the amendments to Part 281 effective imediately.

(Natural Gas Policy Act of 1978, P.L. 95-621. Department of Energy Organization Act, 42 U.S.C. § 7107 et seq.; E.O. 12009, 42 Fed. Reg. 46267; Administrative Procedure Act, 5 U.S.C. § 551 et seq.)

In consideration of the foregoing, Subpart B, Part 281, Chapter 1, Title 18 of the Code

of Federal Regulations is amended as set forth below, effective immediately.

By the Commission. Chairman Curtis voted present.

(S E A L)

Kenneth F. Plumb,
Secretary.

1. Section 281.204 is amended to redesignate paragraph (a) as subparagraph (a)(1) and to add a new subparagraph (a)(2) to read as follows:

(a)(2) Notwithstanding subparagraph (a)(1) a pipeline may elect to file its tariff sheets on November 1, 1979 with a proposed effective date of December 1, 1979 if

(i) it files with the Secretary no later than October 1, 1979 written notice of its decision to file its tariff sheets on November 1, 1979; and

(ii) it continues its interim curtailment rule implemented under Subpart A in effect until December 1, 1979.

2. Section 281.211 is amended in paragraph (a)(1)(i) by deleting the date "July 15, 1979" and inserting in lieu thereof "July 31, 1979."

3. Section 281.211 is amended in paragraph (a)(2)(i) by deleting the date "August 15, 1979" and inserting in lieu thereof "August 31, 1979."

4. Section 281.211 is amended in paragraph (b)(1)(i) by deleting the date "July 15, 1979" and inserting in lieu thereof "July 31, 1979."

5. Section 281.211 is amended in paragraph (b)(2) by deleting the date "July 30, 1979" an inserting in lieu thereof "August 15, 1979."

6. Section 281.211 is amended in paragraph (b)(3) by deleting the date "August 15, 1979" and inserting in lieu thereof "August 31, 1979."

7. Section 281.212 is amended in paragraphs (b) and (c) by deleting the date "August 31, 1979" where it appears and inserting in lieu thereof "September 14, 1979."

8. Section 281.213 is amended in paragraph (c) by deleting the date "September 14, 1979" and inserting in lieu thereof "September 21, 1979."

9. Section 281.213 is amended in paragraph (e) by adding a new sentence at the end of that paragraph to read as follows:

The Data Verification Committee shall submit its report on October 23, 1979, if the pipeline has elected under § 281.204(a)

to file its tariff sheets on November 1, 1979.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

REHEARING

Before Commissioners: Georgiana Sheldon, Acting Chairman; Matthew Holden, Jr., and George R. Hall.

Final Regulation for the Implementation of section 401 of the Natural Gas Policy Act	)))	Docket No. RM79-15

ORDER NO. 29-C

ORDER AMENDING REGULATION, GRANTING IN PART AND DENYING IN PART PETITIONS FOR REHEARING AND MOTIONS FOR CLARIFICATION, DENYING MOTION FOR ORAL ARGUMENT, AND DENYING MOTIONS TO WAIVE REGULATIONS AND ACCEPT LATE-FILED PETITIONS

(Issued October 22, 1979)

On May 2, 1979, the Commission issued Order No. 29, the permanent curtailment rule in Docket No. RM79-15. That order implements section 401 of the Natural Gas Policy Act of 1978 (NGPA).

Timely petitions for rehearing have been filed by Air Products and Chemicals,

Inc., Stauffer Chemical Company, and Williamette Industries, Inc., (Air Products), Allied Chemical Corporation (Allied), American Bakers Association (ABA), American Gas Association (AGA), Atlanta Gas Light Company (Atlanta Gas), Brooklyn Union Gas Company (Brooklyn Union), Columbia Gas Transmission Company (Columbia Gas), Columbia Nitrogen Corporation and Nipro, Inc. (Columbia Nitrogen), Consolidated Edison Company of New York (Con Ed), Consolidated Gas Supply Corporation (Consolidated Gas), Eli Lilly and Co. (Eli Lilly), Entex, Inc. and Louisiana Gas Service Company (Entex), Farmland Industries, Inc., and Terra Chemicals International, Inc. (Farmland), The Fertilizer Institute (TFI), Gas Consumers Group (Gas

Consumers),[1] General Service Customer Group (GSCG), Natural Gas Pipeline Company of America (Natural), Northern Illinois Gas Company (NI-Gas), Process Gas Consumers Group and Georgia Industrial Group (PGC), Southern California Gas Company (So-Cal), State of Louisiana, Tennessee Gas Pipeline Company (Tennessee),[2] Texas Eastern Transmission Corporation (TETCO), Transcontinental Gas Pipe Line Corporation (Transco),[3] United Municipal Distributors Group (Municipals),

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1/ Gas Consumers seeks clarification concerning the effect of Order No. 29 on the small customer exemption provisions of curtailment plans. In the alternative it seeks rehearing of Order No. 29.

2/ Tennessee's petition includes a request for clarification.

3/ Transco's petition will not be addressed here, since it was conditionally exempted from the requirements of Order No. 29 by an Order issued on August 2, 1979, in Docket No. RM79-15.

and United States Brewers Association, Inc. (Brewers).

Late petitions for rehearing were filed by United Gas Pipe Line Company (United) and Consolidated Gas Supply Corporation (Consolidated Gas). Consolidated and United filed motions asking the Commission to waive its regulations and accept their late-filed petitions for rehearing. In the alternative, each asks that its petitions be treated as a petition for reconsideration.

Both United and Consolidated Gas aver that their employees left their respective offices on June 21, 1979, in what should have been ample time to file an application for rehearing before the 5:00 p.m. deadline, but they arrived after 5:00 p.m. and the Secretary's office refused to accept the filings.

In effect, petitioners allege nothing to justify their late filings other than

thay they were late. Under the Commission's Rules of Practice and Procedure, petitioners had a full 30 days within which to file applications for rehearing. That they chose to wait until the last possible minute to file was a decision made at their peril.

Good cause for waiving the regulations pertaining to the filing of applications for rehearing has not been shown. We will, however, treat the petitions filed by United and Consolidated Gas as petitions for reconsideration and will address the merits of the arguments contained therein.[4]

On June 22, 1979, the Commission issued an Order granting rehearing of Order No. 29

4/ In ruling on these filings the Commission does not waive its right to assert that United and Consolidated Gas are not entitled to seek judicial review of the Commission's order in this proceeding because they failed to apply timely for rehearing of Order 29. See Boston Gas Co. v. FERC 575 F2d 9751 (1st Cir. 1978).

solely for purpose of further reconsideration. We will now discuss the merits of the numerous issues raised by the petitions for rehearing.

Requests for Extension

The filing deadlines established in Order No. 29 were amended by Order Nos. 29-A (44 FR 37499, June 27, 1979) and 29-B (44 FR 45922, August 6, 1979). These subsequent orders render moot requests for reconsideration or extension of the deadlines by Eli Lilly, UGI Corporation, Pacific Gas and Electric Company, So Cal, Texas Eastern, and NI-Gas.

Oral argument

In addition to is petition for reconsideration, State of Louisiana also filed a motion for oral argument on the issue of whether the NGPA has superseded the non-discrimination requirements of Section 4(b) of the

Natural Gas Act, as interpreted in State of North Carolina v. FERC.[5]

This issue is thoroughly discussed in the comments and petitions of numerous parties to this proceeding. We do not believe that oral argument would add significantly to the record already compiled. State of Louisiana's motion is therefore denied.

Coordination With Rules Implementing Sections 401(b) and 402 of the NGPA

Several parties seek reconsideration on the grounds that the rule implementing section 401(a) is not coordinated with the implementation of sections 401(b) (alternative fuel) and 402 (essential industrial process and feedstock).

GSCG accuses the Commission of creating "moving targets" and argues that the issues of section 401(b) must be addressed before

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5/ 584 F.2d 1003 (1978).

any gas is reclassified in Priority 2. Likewise, Consolidated Gas states that the date for filing data on agricultural uses should be postponed until after rules are issued under section 401(b), because only agricultural users without alternative fuel capability are intended to be protected by the new agricultural priority.

PGC states that the Commission has erred by implementing section 401(b) without regard to the impact on the implementation of section 402.

AGA argues that it will unnecessarily disrupt existing curtailment plans if a rule is issued under section 401(a) before section 401(b) is implemented.

United states that no rule under 401(a) should issue until the "consequences of such action can be considered" together with rules under section 402. United argues that

to do otherwise will cause multiple and duplicative collections of data.

It is the Commission's view that its obligations under the NGPA do not permit any further delay in the final implementation of section 401(a). That section is subject to a statutory deadline. Sections 401(b) and 402 are not. Congress clearly intended that implementation of section 401(a) should be given precedence if similarly expeditious implementation of sections 401(b) and 402 was not possible. Given the different data required for implementing those sections and the need to coordinate rulemaking among the Department of Agriculture (USDA), the Economic Regulatory Administration (ERA), and the Commission, the simultaneuos implementation of all sections of Title IV would be impossible without substantial delay of a final rule under section 401(a).

In this connection, the Commission observes that section 401 does not preclude reclassifying agricultural uses prior to a determination of alternative fuel availability under section 401(b). On the contrary, the curtailment priorities of section 401(a) must apply unless the Commission determines under section 401(b) that alternative fuel is reasonably available and economically practicable.[6] The absence of a time limit corresponding to the 120 day limit of section 401(a) also supports this interpretation.

Texas Eastern asks that the definition of alternative fuel in section 281.203(a)(16) be changed to include alternative fuel used in facilities other than

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6/ In this regard, section 401(b) differs from section 402(b), which applies the curtailment protection of 402(a) to essential industrial process and feedstock uses "only if the Commission determines" that alternative fuel is not. (Emphasis added.)

boilers. Since no rule implementing section 401(b) has yet been implemented, the definition of alternative fuel in Order No. 29 has no present effect.[7] A rule implementing the alternative fuel provision of section 401(b) is under consideration in Docket No. RM79-40. The rule issued in that proceeding will contain a substantive definition of alternative fuel.[8] Nevertheless, to avoid confusion, section 281.203(16) will be amended to define alternate fuel "as it is defined in Subpart C," and to redesignate "alternate fuel" as "alternative fuel."

United and AGA point out that Order No. 29 appears to adopt the final USDA rule, even though only the USDA interim final rule

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7/ See Notice Concerning June 15, 1979 Filing Deadline, Docket Nos. RM79-15 and RM79-40, June 8, 1979.

8/ See Notice of Proposed Rulemaking, Docket No. RM79-40, August 29, 1979.

was in effect when Order No. 29 was issued. AGA says that this confusion will make it difficult to comply with the filing requirements of Order No. 29. Both United and AGA urge this as an additional reason for postponement.

In Order No. 29-A, which was issued on June 15, 1979, in this docket,[9] the Commission made it clear that it was adopting the final, not the interim, USDA rule. Order 29-A was issued more than a month before the deadline for agricultural users to file requests for reclassification of essential agricultural uses. There has therefore been

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9/ 44 FR 37499, June 27, 1979.

ample time for compliance with the requirements of Order No. 29.

The Establishment of New Curtailment Priorities

Columbia Gas argues that the NGPA does not require or intend that interstate pipelines reprioritize their existing curtailment plans. Instead, Columbia urges adoption of a final rule based an exemption procedures similar to the interim rule. In support of its arguments Columbia states that (1) requiring pipelines to reprioritize their end-use priorities is inconsistent with Congress' intention to minimize disruption of existing curtailment plans, (2) the Natural Gas Act, as interpreted in State of Louisiana v. FPC,[10] requires the Commission to tailor any curtailment plan to the

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10/ 503 F.2d 844 (5th Cir. 1974). The significance of State of Louisiana v. FPC is discussed at pages 9-10 infra.

particular circumstances existing on that pipeline,[11] and (3) section 5 of the Natural Gas Act, and cases interpreting that section, require the Commission to determine whether an existing curtailment plan is just and reasonable before ordering that plan to be reprioritized.

Columbia's arguments do not support rehearing. In the first place, NGPA does contemplate that interstate pipelines may be required to reprioritize their existing curtailment plans to the extent necessary to comply with Title IV. The Conference Report specifically states:

11/ Columbia Gas mentions no "special circumstances" existing on its system to which the rule should be tailored. Furthermore, Columbia Gas projects no curtailments on its system through 1987.

> For purposes of implementing this section, the Commission is instructed to reopen curtailment plans only to the extent necessary to adjust those plans to bring them into conformity with the new curtailment priority schedule.[12]

Furthermore, the ERA rule implementing section 401 provides that the relative order of priorities in existing curtailment plans will remain unchanged only if those priorities do not conflict with the required protection of high priority and essential agricultural uses.[13] Although a rule establishing exemption procedures may be one way of resolving such a conflict, it is not the only way. We understand the ERA rule as providing that, in cases of conflict, the priorities of existing curtailment plans may

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12/ Emphasis added. H.R. Report No. 95-1752, 95th Cong., 2d Sess. 113 (October 10, 1978) (hereinafter cited as Conference Report).

13/ 10 CFR 580.03(c), 44 FR 15642, March 15, 1979.

be changed. This interpretation is consistent with the Conference Report, which assures the Commission that it "has the necessary flexibility in implementing any changes."[14]

The relevance of the Natural Gas Act is discussed in more detail at pages 10-11 infra. At this point, it is sufficient to say that the Natural Gas Act and the court cases thereunder do not require rehearing of Order No. 29. For purposes of implementing section 401, the hearing procedures of section 5 of the Natural Gas Act are the kind of "lengthy proceedings which might throw existing curtailment plans into disarray."[15] And if any pipeline does have "particular circumstances" making the rule

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14/ Conference Report at 113.

15/ Id.

unsuitable to it, the adjustment procedures of section 502(c) are available.[16]

The interim rule established procedures whereby agricultural users could request adjustments from their suppliers in case of supply deficiencies. This ad hoc approach provides adequate protection during the summer season. When gas supplies were sufficient so that agricultural users did not have to seek relief on a large scale. If curtailments deepen during the winter, however, numerous requests for adjustment could be expected on most pipeline systems. Under such circumstance, the interim rule could be an awkward device, creating much

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16/ Cf. Natural Gas Pipeline Company of American and Inland Gas Company, Inc., Docket Nos. TC79-128, et al. (May 2, 1979). The Commission found that the permanent rule was not suited to the curtailment systems of Inland Gas Co., Inc. and Natural Gas Pipe Line Co. Instead, the companies were ordered to file tariffs conforming to the essential character of the rule.

uncertainty in the implementation of curtailments. The Commission believes that the rule of Order No. 29 is more appropriate on a permanent basis. It establishes priorities in advance of curtailment, and allows the pipelines and their customers to plan accordingly.[17]

The need to tailor curtailment plans to individual pipelines

United, Columbia Gas, and State of Louisiana criticize the establishment of a single "inflexible" rule applicable to 37 different pipelines.

17/ This does not mean that the Commission would not approve a plan similar to the interim plan in lieu of an Order 29 plan for a particular pipeline in the context of an adjustment or adjustment/settlement proceeding. In such cases, sufficient focus is placed on the particular situation of the pipeline and on the viability of an interim type plan on a long-term basis. See e.g., Transcontinental Gas Pipeline Company, Docket No. RP72-99, Order Denying Rehearing, issued August 2, 1979.

State of Louisiana argues that the rule is especially inappropriate for United's system, because it would require United to serve the historical base period requirements of its pipeline customers for agricultural and high priority use.[18] According to State of Louisiana, this method of curtailment has never been used on United's system and could result in the curtailment of high priority and essential agricultural uses in United's direct market.

In a related argument, Municipal Distributors also criticize the rule for failing to distinguish between direct and pipeline customers on United's system. Municipal Distributors asks that (1) United be

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18/ State of Louisiana does not describe the rule's effect quite accurately. At least as applied to essential agricultural requirements, the rule would not limit entitlements to base period requirements, but would require that 100 percent of current requirements be served.

deleted from the list of pipelines included in the rule and (2) United be required to file tariff provisions protecting high priority and essential agricultural customers in United's direct market only.

Citing State of Louisiana v. FPC,[19] and Consolidated Edison Co. of New York, Inc., v. FPC,[20] Columbia Gas asserts that the rule fails to meet the requirement that the Commission tailor any curtailment plan for an individual pipeline to the particular circumstances existing on that pipeline system.

In applying Order No. 29, the Commission has not been inflexible. Where the rule was obviously unsuited to the system of a particular pipeline, it has not been applied.[21] The Commission has also evinced

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19/ 503 F.2d 844, 872 (5th Cir. 1974).

20/ 511 F.2d 372, 381 (D.C. Cir. 1974).

21/ See Note 16 supra.

flexibility in molding curtailment plans in the settlement context.[22]

If petitioners believe the rule unsuited to individual pipeline curtailment plans, the appropriate avenue for relief is a 502(c) adjustment or offer of settlement, not rehearing of the rule.[23]

The cases cited by Columbia are inapposite. Besides being decided prior to enactment of the NGPA, those cases applied to the establishment of entire curtailment plans,[24] rather than the limited reopening

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22/ See Columbia Gas Transmission Corporation, Docket No. TC79-127, Order Approving Settlement, September 27, 1979.

23/ See United Gas Pipeline Company, Dockets Nos. RP71-29, et al., Order Granting Motion to Establish Procedures and Denying Petition for Waiver of Rules, September 28, 1979.

24/ Existing curtailment plans have already been tailored to the needs of individual pipelines in accordance with the above mentioned cases and the requirements of the Natural Gas Act.

of established plans to implement a discrete change. Furthermore, the rule here, unlike the curtailment plans criticized in the cases cited[25], is related to the record evidence in this particular case.

The Natural Gas Act

Numerous petitioners challenge the rule on the grounds that it is inconsistent with various provisions of the Natural Gas Act and court decisions thereunder.

25/ In Consolidated Edison Co. of New York v. FPC, the court criticized the Commission's rejection of a settlement filed by Transco. The court said that the Commission's belief that curtailment on the bases of the priorities of Order No. 467-B would be better "appears to be premised on the Commission's general policy statement [467-B] rather than an examination of evidence pertianing to the Transco system." 511 F.2d at 381.

Order No. 29 is a rule, not a policy statement, and was based on a record developed in accordance with rulemaking procedures.

PGC asserts that failure of the Commission to determine whether its order meets the standards of the Natural Gas Act constitutes error. Columbia Gas and State of Louisiana both argue that the Commission lacks authority to prevent pipelines from filing, under section 4 of the Natural Gas Act, a plan that does not comply with Order No. 29, but adequately protects high priority and essential agricultural uses. State of Louisiana and United challenge the Commission's authority to establish new priorities for any pipeline without complying with the requirements of Section 5 of the Natural Gas Act.

The NGPA did not repeal the Natural Gas Act (NGA). Nevertheless, it did modify the NGA to require a higher level of protection for essential agricultural uses than for industrial uses.

Order 29 was promulgated to implement the requirements of Section 401. The order satisfies the statutory requirements of Section 401 as well as the requirements of section 4 of the NGA as modified by the NGPA.

Order 29 is a rule and it requires 37 named interstate pipelines to implement Section 401 in a particular and detailed manner. Interstate pipelines may file plans under section 4 of the Natural Gas Act that deviate from Order 29. But such a filing by itself would not waive the requirement to file in accordance with Order 29 unless the pipeline has received an adjustment under Section 502(c). A deviant plan filed under section 4 of the NGA cannot go into effect until the requirements of Order 29 have been waived.

Section 401 of the NGPA required an expeditious change in pipeline curtailment plans. The Commission has determined that the only feasible way to meet its obligations

in such a short time period was to issue rules requiring all pipelines to amend their curtailment plans. A section 5 proceeding under the Natural Gas Act would be a wholly inappropriate vehicle for implementation of Section 401 in light of the time limits imposed by Congress.[26]

State of North Carolina v. FERC

Many petitioners seek rehearing on the grounds that Order No. 29 fails to meet the requirements of State of North Carolina v. FERC.[27] For the reason indicated in the preamble to Order No. 29, the Commission does not believe that North Carolina

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26/ Because of the delay involved, the Supreme Court has indicated that a section 5 proceeding is unsuitable for evaluating curtailment plans. FPC v. Louisiana P & L, 406 U.S. 621, 643 (1972).

27/ 584 F.2d 1008 (D.C. Cir. 1978). See petitions for rehearing by Air Products, Atlanta Gas, Columbia Gas, Entex, PGC, State of Louisiana, and United.

controls this rulemaking.[28] Even if that case were applicable, however, Order No. 29 would not be inconsistent with its requirements.

Since the NGPA does not require reopening the base periods of the existing curtailment plans, the issue of stale base period data does not arise under Order No. 29. Moreover, because the Secretary of Agriculture has established essential agricultural requirements on a current basis, such uses will be updated annually and the question of stale data is thereby mooted for these uses.

State of Louisiana, United, Columbia Gas, and Entex all criticize the Commission for failing to assess the rule's "impact on actual end-use." To the extent they argue that the Commission cannot implement section

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28/ Order No. 29 at 5-6.

401 without first collecting voluminous end-use data for each pipeline affected, we reject the argument. Such an effort is not within the bounds of "the maximum extent practicable" and would unduly delay implementation of the rule, perhaps for years. Moreover, to the extent that Order 29 causes a particular hardship, inequity, or undue burden, an adjustment to the rule may be granted.

Contract limitations

Allied, ABA, Columbia Nitrogen, TFI and Brewers argue that contract and certificate limitations should not limit the amount of gas that essential agricultural customers may receive. These parties say that the Commission lacks authority to reduce the amount of gas essential agricultural users may receive below the level of requirements certified by the USDA. Thus, it is argued,

section 281.204(c)(2) of the rule must be deleted.

This same argument was raised by Brewers in its petition for rehearing of the interim rule in Docket No. RM79-13. In the order denying rehearing in that proceeding, the Commission noted that Order No. 29 did not change the volumes certified by the Secretary of Agriculture. The relevant issue was whether or not the pipelines were obliged to meet those requirements regardless of contract or certificate limitations. On this issue the Commission stated that section 401 does not create new contract or certificate obligations. Rehearing on this issue is denied here for the same reasons it was denied in Docket No. RM79-13.[29]

29/ Order Denying Rehearing of Interim Curtailment Rule, Docket No. RM79-13, June 20, 1979 at 5-7.

The Commission does not believe that Section 401 creates new contract or certificate obligations for interstate pipelines. Section 401 requires only an amendment to curtailment plans of interstate pipelines. Curtailment plans are a method of allocation of contract demand of natural gas. FPC v. Transcontinental Gas Pipeline Corp. 423 U.S. 326, 327-28 (1978).

The attribution formula

Various complaints are raised concerning the attribution rule which apportions high priority and essential agricultural requirements. Entex states that the attribution formula contained in section 281.209 is unworkable and could overstate the agricultural requirements of partial requirements customers. Entex is correct: the rule was intended to attribute exactly 100 percent of essential agricultural requirements by essential agricultural users. The

attribution formula as applied by distribution companies and interstate pipelines was intended to allow attribution in the same manner as was done in the underlying curtailment plans of interstate pipelines. Rehearing is granted for the limited purpose of correcting the attribution formula of § 281.209 to reflect Commission intent.

Only interstate pipelines are required to attribute their priority 1 requirements. Distributors are not. Entex says this favors distributors served by more than one supplier. The rule does not require attribution by a distributor because the total base period entitlements of each distributor have already been established by operation of its suppliers' currently effective curtailment plan. The distributor merely determines what volume in its base period entitlements from each supplier reflected end uses now defined under Order 29 as high priority uses.

Those volumes are now placed in the new Priority 1 and there is no need for attribution.

Tennessee, on the other hand, argues that it is inconsistent to require even pipelines to attribute high priority requirements, since the rule does not provide for updating high priority requirements and attribution could result in an entitlement different than that currently contained in the base period. To the extent that Priority 1 volumes of interstate pipelines increase (which is purely speculative) is will be caused by the new definition of high priority uses incorporated from the ERA.

NI-Gas and Brewers argue that non pipeline supplies should not be included in the attribution formula. According to NI-Gas, this penalizes distributors that have engaged in self help and may be an unconstitutional taking without just compensation. NI-Gas alleges that by recognizing the

status quo of pipeline curtailments, the provision including non pipeline supplies amounts to granting an abandonment without complying with the provisions of the Natural Gas Act.

Brewers adds that gas from other sources is likely to be more expensive, and that by including it in the attribution formula, the rule precludes access to lower priced pipeline gas. According to Brewers, this contradicts the purpose of preventing unnecessary increases in the cost of food.

The NGPA does not require that pipelines deliver more gas than is actually necessary to meet the requirements certified by the USDA. On the contrary, the Commission is directed to open existing curtailment plans "only to the extent necessary" to bring them into conformity with the new priority

schedule.[30] Therefore, to the extent that essential agricultural requirements are being met by non-pipeline sources, they will not be reclassified in the pipeline's curtailment plan. Otherwise, the rule would extend Priority 2 protection to agricutural users, whose needs are being met from other sources at the expense of lower priority users, including industrial process and feedstock users.

The inclusion of non-pipeline sources in the attribution formula deprives no one of gas. It only prevents users from receiving additional gas to serve requirements being met from another source.

The base period

AGA, GSCG, Natural, United, PGC, Brooklyn Union, and ConEd all challenge the use of an updated or rolling base period for

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30/ Conference Report at 113.

calculating agricultural requirements. These petitioners maintain that it is improper to extend priority 2 protection to new or expanded agricultural uses not included in existing curtailment plans.

In a related argument, PGC, Natural, United, Brooklyn Union, and GSCG say that it was error for the Commission to adopt completely the USDA certification of 100 percent of current agricultural requirements.

These arguments were raised in petitions for rehearing in Docket No. RM79-13 and were rejected. They are rejected here for the same reasons.[31] Furthermore, when Order No. 29 was promulgated, the Commission fully explained the basis for its decision

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31/ Order Denying Rehearing of Interim Curtailment Rule, Docket No. RM79-13, June 20, 1979, at 8-11.

to expand the requirements above base period volumes.[32]

PGC argues that because the USDA certification is incorporated into the ERA rule, the Commission has authority under sections 403 and 404 of the DOE Act to review that certification. USDA's authority to certify agricultural requirements is independent of any authority the NGPA grants to ERA or the Commission. This authority therefore cannot be diluted or made subject to our review simply because it is recognized by the ERA rule.

Brooklyn Union further challenges adoption of agricultural entitlements equal to 100 percent of current requirements because there has been no showing that expanded service is 'necessary' for 'full food and fiber

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32/ Order No. 29 at 12-13 (44 FR 26855, 26857).

production' or that adherence to existing base periods would impair operations of essential agricultural users.

No such showing is required, or even relevant, in this proceeding. Determinations of what is necessary for full food and fiber production are the province of the USDA, not the Commission. Likewise, whether or not adherence to existing base periods would impair essential agricultural uses is not the issue. The issue is whether or not adherence to existing base periods would fulfill the Commission's duty to implement the USDA certification of 100 percent of current requirements. For reasons already mentioned we find that it would not.

Capacity limitations

Farmland and TFI seek rehearing on the grounds that the protection afforded by section 401 and Order 29 should apply to curtailments resulting from capacity limitations

as well as from supply shortages. Farmland urges that section 281.203(a)(6) (definition of end-use curtailment) be modified accordingly. The NGPA does not define the term "curtailment plan." In large part, curtailment has been a method of dealing with natural gas shorgages vis-a-vis contract obligation to deliver natural gas. For example, Order 467-B established end-use priorities for deliveries of natural gas in the face of a supply shortage. If TFI and Farmland face supply problems in the absence of curtailment, they may avail themselves of their Natural Gas Act remedies. Accordingly, rehearing on this issue is denied.

Burner tip curtailment

Allied, ABA, Columbia Nitrogen, and TFI assert that Order No. 29 is in error because it does not require local distributors to

deliver gas to the end-users to whom agricultural uses are attributable.

The Commission's authority to establish curtailment plans for interstate pipelines is founded in its transportation jurisdiction under section 1(b) of the Natural Gas Act.[33] Section 1(b) of that act, however, specifically prohibits the exercise of Commission jurisdiction over "the local distribution of natural gas." Consequently, it has not been Commission policy to attach end-use conditions to pipeline curtailment plans.[34]

Nothing in section 401 indicates an intention to expand the Commission's jurisdiction to include local distributors. On the

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33/ FPC v. Louisiana Power & Light Co., 406 U.S. 621, 636-41 (1972).

34/ Opinion No. 754, Panhandle Eastern Pipe Line Co., Docket No. RP71-119, February 27, 1976, at 31-33.

contrary, the House bill would have applied the curtailment prohibitions of section 401 to local distribution companies, but this provision was deleted from the final act.[35]

There are sound policy reasons that weight against extending the Commission's curtailment jurisdiction to include local distributors. Such an extension of curtailment jurisdiction would create inevitable conflict with local regulatory agencies. Moreover, it would not be feasible for this agency to administer workable curtailment plans for the thousands of local

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35/ Allied argues that because the Senate passed legislation was designed to deregulate natural gas within the framework of the Natural Gas Act, it cannot be concluded that the Senate intended to reject the House's inclusion of local distribution companies. This argument is not persuasive, especially if the intention was to deregulate within the frame work of the Natural Gas Act. As has been shown, the Natural Gas Act specifically excludes local distribution from Commission jurisdiction.

distributors throughout the country. State agencies, on the other hand, are in a position to know the practices and requirements of local distributors and there customers.

In addition, if conditions requiring the flow through of gas were imposed, the Commission would face the dilemma of applying those conditions only for high priority and essential agricultural uses, or reopening every curtailment plan to provide flow-through to all priorities.

For these reasons, rehearing in this issue is denied.

GSCG asks that the rule be amended to indicate that it does not require "state commissions to order local distribution companies to add new customers, increase deliveries or execute new or modified contracts or service agreements." The rule is so

clarified. A specific amendment is unnecessary.

"Necesary adjustments" to current requirements.

ABA, TFI, Farmland and PGC all question the meaning of the rule's definition of current requirements (section 281.208(b)(1)(ii). Farmland argues that it is improper to impose an historical base period restriction on agricultural requirements. ABA and TFI urge that the phrase "with necessary adjustments" be interpreted to permit calculation of actual protected current requirements rather than limit agricultural users to the amount of gas used in a prior time period.

PGC, on the other hand, says that it is error to include "energy consumption" within the definition rather than "natural gas consumption."

The definition of current requirements is intended to implement fully the USDA certification of 100 percent of current requirements. This certification would not be fully recognized if essential agricultural users who use alternative fuel as a result of past curtailment are limited to whatever amount of gas they were able to obtain or use during that period. Consequently, current requirements are defined to include total energy requirements rather than natural gas only.

The phrase "with necessary adjustments" is intended to provide for users who have significantly expanded their capacity since the most recent 12 month period for which data is available or who may have been operating at less than full capacity during that period and are now at full capacity. The rule uses the most recent 12 month period for which data is available as the most practicable method for making an objective

determination of current requirements. If this period would not accurately reflect the current requirements of particular agricultural users because of significant changes in capacity, however, these changes may be reflected in a "necessary adjustment" to the collected data.

The rule does not limit agricultural users to an historical base period. Essential agricultural users may submit requests to change their Priority 2 entitlements under section 281.211(b)(4).

Storage gas

Order 29 retains the status quo of storage gas. For those pipelines which sprinkle, storage volumes will be spread over all priorities, including the new high-priority and essential agricultural uses. For those pipelines which treat storage as an end use and place the volumes in old Priority 2 the

curtailment plan under Order 29 will result in putting these volumes in a lower priority.

Nobody protests the results of those pipelines which sprinkle storage volumes. AGA, Brooklyn Union, Columbia Gas, GSCG, Natural, Consolidated Gas and NI-Gas object to the downgrading of storage gas for those pipelines which have previously placed storage in Priority 2.

By maintaining the status quo, the Commission believes it can best implement the Congressional intent of avoiding protracted litigation and extensive reopening of curtailment plans. Nonetheless, if the status quo for any of those few pipelines which do not use storage sprinkling will lead to "an undue preference or advantage" or the maintenance of "unreasonable difference in...service...either as between localities or between classes of services, the

pipelines may make an appropriate filing to modify its treatment of storage volumes.

Certain petitioners assert that Order 29 violates the ERA rule:

> "Nothing in this rule shall prohibit the injection of natural gas into storage by interstate pipelines or deliveries to its customers for their injection into storage unless it is demonstrated to the Federal Energy Regulatory Commission that these injections or deliveries are not reasonably necessary to meet the requirements of high-priority or essential agricultural users." 10 C.F.R. 580.03(d)

Stripped of its negatives, the rule is intended to allow the Commission flexibility in treatment of storage volumes.[36] And in the absence of a showing that storage is used exclusively to serve high-priority and essential agricultural requirements or that failure to fill storage may result in insufficient supplies to serve those requirements

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36/ See 44 FR 15642, 15645, March 15, 1979.

in the winter, we will not adopt the suggestions that storage injection be included as a high-priority use.

Small distributors exemptions

Gas Consumers asks clarification to indicate that the rule was not intended to effect the exemption of small distributors from curtailment, as provided in many pipeline curtailment plans. Gas Consumers advances many policy and factual arguments in support of retaining the small distributor exemptions.

We agree with the arguments advanced by Gas Consumers. The Commission has previously found the small distributor exemptions to be in the public interest. Order No. 29 was not intended to disturb these exemptions. The rule is so clarified.

Payback obligations

Section 281.214(b) of the rule provides for payback in dollars or in kind as a rmemedy

for violations of the rule. GSCG urges that payback be prescribed for any gas that is misclassified. According to GSCG, this deterrent is necessary to assure that only the minimum amounts of gas are upgraded, especially since alternative fuel determinations have not yet been implemented.

GSCG states that in its Notice of Proposed Rulemaking the Commission indicated that it would require payback if gas is misclassified by the data verification committee. This is inaccurate. The notice said that "the Commission will grant relief prospectively" when high priority and essential agricutural uses are misclassified and that "the Commission reserves the right to order payback of excess volumes in appropriate cases." Section 281.208(c)(4) of the proposed rule provided that "[t]he Commission in its discretion may direct the payback to excess volumes taken while the

end-user was temporarily misclassified." (Emphasis added.)

The final rule is consistent with, albeit not identical to, the provisions of the notice and the proposed rule. We would not extend the rule to require payback in cases of simple error. It would not be consistent with the purpose of protecting high priority and essential agricultural uses to put this risk on those who may good faith requests for classification under Order No. 29.

Requests for classification of essential agricultural requirements are required to be under oath (section 281.211(b)(iii)). We believe that this requirement, along with the remedies established in 281.214(b), provides sufficient deterrent to misclassification.

Schools and hospitals

GSCG asks that the rule be amended to clarify the definitions of schools and

hospitals. GSCG says that it is unclear whether "dormitories, administration buildings, and laboratories" would come within the definition of school. To the extent such buildings are an integral part of "a facility, the primary function of which is to deliver instruction to regularly enrolled students in attendance at such facility," they would come within the definition.

GSCG asks that the sentence excluding "outpatient clinics or doctors offices" from the definition of hospital be stricken, since such buildings are part of the hospital complex in some instances.

It would not be administratively feasible to distinguish for separate curtailment treatment outpatient clinics and doctors offices that are physically connected to the rest of the hospital or its heating plant. Such uses should be considered part of the "facility" and included

within the definition. Otherwise they are excluded.

Clarification of these issues obviates the need for further amendment.

Consultations with USDA

PGC suggests that the Commission's consultations with USDA may have violated ex parte regulations because section 401(b) only authorizes consultations concerning alternative fuel determinations. We do not give section 401 such a limited reading. As numerous petitioners for rehearing, including PGC,[37] remind us, our responsibilities under sections 401(a) and 401(b) are closely related. In any event, memoranda submitted to the Commission by the USDA pursuant to

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37/ See PGC petition at 9.

its consultations are in the public record of this proceeding.[38]

The data verification committees (DVCs)

PGC urges that a representative of an industrial process or feedstock user should be included on all DVCs. Secton 281.213 was never intended to preclude representation on the DVCs by representatives of other industries.

Protests and complaints

PGC criticizes section 281.213(c), which limits protests to customers of the interstate pipeline. Section 281.214(a), limiting complaints to aggrieved direct customers and distribution companies, is similarly criticized. PGC would extend standing under these sections to "all interested parties." We agree. This policy is appropriate

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38/ Notice of Proposed Rulemaking, Docket No. RM79-15, January 18, 1976, at 8 n. 2.

in light of the new policy of end product curtailment embodied in the NGPA. Order 29 will be modified to allow full participation by all interested persons.

Filing requirements

Section 281.204(a) requires pipelines subject to the rule to file tariff sheets "including an index of entitlements." Tennessee submits that because its index of entitlements is so voluminous, this requirement is unnecessary and unduly burdensome. Tennessee notes that its present index of entitlements totals 132 pages and that base period data used by most pipelines has not been included in company tariffs in the past.

As an alternative, Tennessee suggests that it file its complete index of entitlements with the Commission and serve copies on its customers and affected state commissions.

Tennessee was the only party to raise this issue. If Tennessee should find the filing of an index of requirements unduly burdensome, it may seek an adjustment.

Rate adjustments

Tennessee states that any significant change in its base period data in conformance with Order No. 29 could affect the sales volume estimates underlying its rates and cause a loss of necessary revenues. Tennessee concern appears to be speculative and beyond the scope of Order 29.

The Commission orders:

For the reasons set forth above, the Commission orders:

A. The petitions for rehearing and clarification are granted to the extent indicated in the body of this order. Otherwise they are denied.

B. The motions by United and Consolidated Gas for acceptance of late filed

petitions for rehearing and waiver of the Commission's Rules of Practice and Procedure are denied.

C. Petitions for extension of filing deadlines by Eli Lilly, Pacific Gas, UGI Corporation, So Cal, Texas Eastern, and NI-Gas are dismissed as moot.

D. The motion for oral argument filed by State of Louisiana is denied.

E. Subpart B, Part 281, Subchapter I, Chapter I of Title 18, Code of Federal Regulations, is amended as set forth below, effective November 21, 1979.

(Natural Gas Act, 15 U.S.C. §§ 717-717w; Natural Gas Policy Act of 1978, 15 U.S.C. §§ 3301-3432; Department of Energy Organization Act, 42 U.S.C. §§ 7101-7352; E.O. 12009, 42 Fed. Reg. 46267.)

By the Commission.
(S E A L)

Kenneth F. Plumb,
Secretary.

1. Section 281.203(a) is revised by deleting subparagraph (16) and substituting the following in lieu thereof:

§ 281.203 Definitions and cross references.

(a) Definitions.

* * *

(16) "Alternative fuel" means alternative fuel as it is defined in Subpart C of this Part.

2. Section 281.205(b) is amended in subparagraph (1) by adding a new sentence at the end of that subparagraph to read as follows:

§ 281.205 General Rules.

* * * * *

(b) Method of curtailment.

* * *

Nothing in this paragraph is intended to alter the operation of any "small customer" or "small distributor" exemption or waiver

(as defined in an interstate pipeline's currently effective curtailment plan).

3. Section 281.209 is revised in by deleting paragraphs (d)(1), (d)(3), (e) and (f) and substituting the following in lieu thereof:

§ 281.209 Attribution

* * * * *

(d) Essential agricultural user.

(1) An essential agricultural user shall calculate its attributable essential agricultural requirements attributable to a particular direct supplier by multiplying its total essential agricultural requirements by the Annual Quantity Entitlements from such direct supplier and dividing the product (numerator) by the sum of all Annual Quantity Entitlements and all volumes received from sources not providing an Annual Quantity Entitlement to such user (denominator).

* * *

(3) If an essential agricultural user does not have Annual Quantity Entitlements with respect to more than one of its direct suppliers, the attributable essential agricultural requirements attributable to a particular direct supplier shall be calculated by multiplying its total essential agricultural requirements by the total volume of natural gas received from such supplier in 1972 and dividing the product (numerator) by the total supplies of natural gas received from all sources in 1972 (denominator).

(e) Local distribution company. A local distribution company shall calculate its attributable indirect essential agricultural requirements among its direct suppliers in the same manner as it attributed its supplies to its direct suppliers for purposes of establishing entitlements in the

currently effective curtailment plans of such direct supplier.

(f) Interstate pipelines. An interstate pipeline shall attribute Priority 1 and 2 entitlements respectively among its direct pipeline supplies in the same manner as it attributed its supplies to its direct pipeline suppliers for purposes of establishing entitlements in the currently effective curtailment plans of such direct suppliers.

4. Section 281.213 is revised by deleting paragraph (c) and substituting the following in lieu thereof:

§ 281.213 Data Verification Committee.

* * * * *

(c) Any interested person may file a written protest concerning the index of entitlements. Such protests shall be filed with the Data Verification Committee no later than September 21, 1979. For years

after 1979, protests shall be filed not later than 30 days after a draft index of entitlements is served in accordance with section 281.212(d) of this part.

5. Section 281.214 is revised by deleting paragraph (a) and substituting the following in lieu thereof:

§ 281.214 Notice, complaint and remedy.

(a) Complaint. Any interested person may file a complaint concerning an alleged violation of this subpart under § 1.6 of this chapter.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1980

The Process Gas Consumers Group, et al.,	)	
Petitioners	)	
v.	)	No. 79-1336
U.S. Department of Agriculture, et al.,	)	
Respondents	)	

(Portions of Caption Omitted in Printing)

PETITIONS FOR REVIEW OF
ORDERS OF THE
U.S. DEPARTMENT OF AGRICULTURE AND THE
FEDERAL ENERGY REGULATORY COMMISSION

Before: MacKINNON, ROBB and WALD,
Circuit Judges

Entered: July 29, 1981

JUDGMENT[1]

These causes came on to be heard on petitions for review of certain interrelated

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1/ [Note by Petitioners: This judgment was vacated by order of the Court. See page 137 supra.]

actions of the Department of Agriculture, the Department of Energy, and the Federal Energy Regulatory Commission, as reflected in certain rulemaking orders of the Department of Agriculture and the Federal Energy Regulatory Commission and were argued by counsel. On consideration of the foregoing, it is

ORDERED AND ADJUDGED, by this Court, that the various rulemaking orders of the Department of Agriculture on review herein are affirmed and the orders of the Federal Energy Regulatory Commission on review herein are affirmed in part, and vacated in part, and the cases seeking review of the Commission's orders are remanded to the Federal Energy Regulatory Commission for further

proceedings, all in accordance with the opinion of this Court filed herein this date.

Per Curiam
For the Court

George A. Fisher
Clerk

Date: July 29, 1981
Opinion Per Curiam
Circuit Judge Wald dissents in part.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1982

The Process Gas Consumers Group, et al.,	)	
Petitioners	)	
v.	)	No. 79-1336
U.S. Department of Agriculture, et al.,	)	
Respondents	)	

(Portions of Caption Omitted in Printing)

PETITIONS FOR REVIEW OF
ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION

Before: Robinson, Chief Judge; Wilkey, Wald, Mikva, Edwards and Ginsburg, Circuit Judges; Robb, Senior Circuit Judge

Entered: October 1, 1982

JUDGMENT

These causes initially came on to be heard by a panel of the Court on petitions for review of interrelated actions of the United States Department of Agriculture, the Department of Energy and the Federal Energy

Regulatory Commission, and the cases were briefed and argued by counsel. Following the issuance of an opinion for the Court, and a dissenting opinion, both filed concurrently with a formal judgment of disposition on July 29, 1981, this Court granted, in part, various suggestions for rehearing en banc and vacated portions of its opinon and judgment. Thereafter, the parties submitted supplemental briefs and the cases were argued before the Court sitting en banc. On consideration thereof, it is

ORDERED AND ADJUDGED by this Court, en banc, that the orders of the Federal Energy Regulatory Commission under review herein are hereby affirmed in part and reversed in part, and these cases are remanded to

respondent Commission for further proceedings, in accordance with the opinion of this Court filed herein this date.

Per Curiam
For the Court

George A. Fisher
Clerk

Date: October 1, 1982
Opinion for the Court
filed by Circuit Judge
Wald.

Nos. 82-1264 and 82-1272

FILED
APR 4 1983
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF LOUISIANA, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

UNITED GAS PIPE LINE COMPANY, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether the Federal Energy Regulatory Commission properly implemented Section 401 of the Natural Gas Policy Act of 1978 by promulgating a generic rule providing that interstate pipelines shall fully curtail lower priority customers before interrupting service to high priority and essential agricultural users, while allowing pipelines to seek adjustment from the rule in individual cases.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1264

STATE OF LOUISIANA, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

No. 82-1272

UNITED GAS PIPE LINE COMPANY, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

OPINIONS BELOW

The panel opinion of the court of appeals (Pet. J.A. 1-105)[1] is reported at 694 F.2d 728. The opinion of the en banc court of appeals (Pet. J.A. 106-138) is reported at 694 F.2d 778. The orders of the Federal Energy Regulatory Commission (Pet. J.A. 139-327) are unreported.

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[1] "Pet. J.A." refers to the joint appendix to the petitions for a writ of certiorari.

JURISDICTION

The judgment of the en banc court of appeals (Pet. J.A. 331-333) was entered on October 1, 1982. The Chief Justice extended the time for filing a petition for a writ of certiorari to and including January 29, 1983. The petition in No. 82-1264 was filed on January 28, 1983, and the petition in No. 82-1272 was filed on January 29, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Sections 401 and 502(c) of the Natural Gas Policy Act of 1978 ("NGPA"), 15 U.S.C. (Supp. V) 3391 and 3412(c), and Sections 4 and 5 of the Natural Gas Act, 15 U.S.C. 717c and 717d, are set forth at 82-1264 Pet. App. 1a-4a, 5a-6a, 9a-10a, and at 82-1272 Pet. App. 1a-4a, 5a-6a, 9a-10a.

STATEMENT

1. Pursuant to Section 401 of the NGPA, 15 U.S.C. (Supp. V) 3391, the Federal Energy Regulatory Commission was required to implement a rule prescribed by the Secretary of Energy providing that, notwithstanding any other provision of law and to the maximum extent practicable, no curtailment plan of an interstate pipeline may provide for the interruption of deliveries of natural gas for any essential agricultural use below the use requirements certified by the Department of Agriculture,[2] unless the interruption is necessary to meet the requirements of high priority users. In the orders at issue here (Pet. J.A. 139-327), the Commission promulgated a rule requiring interstate pipelines to make a one-time filing of tariff sheets superimposing the two NGPA—mandated priority-of-service

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[2]The Department of Agriculture was charged by NGPA, Section 401(c), 15 U.S.C. (Supp. V) 3391(c), with identifying essential agricultural users and then certifying to the Secretary of Energy and the Commission the natural gas requirements of such users necessary to meet the requirements of full food and fiber production.

categories (consisting of high priority users and essential agricultural users, respectively) on their existing curtailment provisions (18 C.F.R. 281.204; Pet. J.A. 204-208). The Commission further provided that if a pipeline believed that the Commission's rule was unsuited for its individual system, relief could be sought through an application for adjustment under Section 502(c) of the NGPA, 15 U.S.C. (Supp. V) 3412(c).[3]

2. On petitions for review, the court of appeals upheld the Commission rule at issue here.[4] The panel rejected petitioners' contentions that the Commission's rule violates the nondiscrimination and procedural requirements of the Natural Gas Act and fails to implement the curtailment priorities of the NGPA (Pet. J.A. 28-35). The en banc court unanimously adopted

> the panel's view that the Commission's specific grants of authority under sections 401, 402, 501 and 502 of the NGPA control over the general requirements of sections 4 and 5 of the Natural Gas Act, 15 U.S.C. §§717c, 717d. In doing so, we accept the Commission's position that section 502(c) of the NGPA, 15 U.S.C. §3412, is an appropriate mechanism for correcting any inequities in specific plans that follow from application of its generic rule. By its terms, section 502(c) allows for adjustments "as may be necessary to prevent special hardship, *inequity, or an unfair distribution of*

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[3]Section 502(c) requires the Commission to adopt a rule that permits persons to seek adjustments from the provisions of the NGPA "as may be necessary to prevent special hardship, inequity, or an unfair distribution of burdens." The rule establishing procedures for seeking these adjustments appears at 47 Fed. Reg. 19041-19043 (1982) (to be codified at 18 C.F.R. 385.1101 *et seq.*).

[4]The court remanded the case to the Commission with respect to certain other matters not relevant to the instant petitions for certiorari.

burdens," 15 U.S.C. §3412 (emphasis added), and the Commission assures us that such adjustments have been granted promptly.

(Pet. J.A. 116 n.3).

ARGUMENT

The court of appeals applied proper legal principles in reviewing the Commission's rule implementing certain curtailment priorities specified in the Natural Gas Policy Act. The decision below, representing the unanimous views of the en banc court of appeals, is correct and does not conflict with the decisions of this Court or any other court; it does not warrant further review.

In enacting the NGPA, Congress directed the Commission to promulgate a rule that, "notwithstanding any other provision of law" and "to the maximum extent practicable," protects essential agricultural users from curtailment unless gas is needed to serve certain defined high priority requirements. NGPA Section 401(a), 15 U.S.C. (Supp. V) 3391(a). By establishing a high priority category and an essential agricultural user category and requiring a one-time adjustment of curtailment tariffs in order to superimpose those categories on existing curtailment plans, the Commission has not, as petitioner United argues (82-1272 Pet. 9), prescribed a rule intended to cover all aspects of a pipeline's curtailments.[5] Rather, as the en banc court of appeals unanimously concluded, the Commission has simply complied with the statutory mandate of the NGPA. Moreover, by permitting adjustments from the rule's requirements pursuant to Section 502(c), the Commission has provided

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[5]For example, the Commission's rule imposes no requirements with respect to such fundamental aspects of curtailment plans as the categorization of all gas uses not covered by Title IV of the NGPA, selection of a current or historical base period, and treatment of storage gas.

"an appropriate mechanism for correcting any inequities in specific plans that follow from application of its generic rule" (Pet. J.A. 116 n.3). The Commission's rule thus comports fully with the "to the maximum extent practicable" language of Section 401(a) of the NGPA.[6]

The en banc court of appeals properly held (Pet. J.A. 116 n.3) that the language "notwithstanding any other provision of law" in Section 401 of the NGPA reflects the intent of Congress that the specific authority granted to the Commission in Title IV of the NGPA supersede Sections 4 and 5 of the Natural Gas Act. It must be emphasized, however, that the NGPA's curtailment provisions supersede the provisions of the Natural Gas Act only to a very limited extent. Thus, petitioners' contention (82-1264 Pet. 25; 82-1272 Pet. 18) that, as a result of the Commission's rules, Section 502(c) of the NGPA has replaced Sections 4 and 5 of the Natural Gas Act as the review standard for determining the lawfulness of curtailment plans is incorrect. As the Commission recently stated, the NGPA requirements have supplanted Section 4 of the Natural Gas Act only with respect to the "establishment and implementation of the higher curtailment priorities." *United Gas Pipeline Co.*, Op. No. 150, 21 F.E.R.C. (CCH) para. 61,016, at 61,077 (Oct. 8, 1982). The traditional Section 4 requirements still apply with respect to all aspects of curtailment allocations not covered by Title IV of the NGPA. See note 5, *supra*.

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[6]The flexibility of the Commission's adjustment process is amply demonstrated by the Commission's treatment of the curtailment plan submitted by petitioner United.

Petitioners' primary concern below was with a provision of the Commission's regulations that provides that deliveries in lower curtailment priorities should be fully curtailed before any interruption of priority 1 or 2 service (18 C.F.R. 281.205(b)). United's court-ordered curtailment plan then in effect, by contrast, employed "differential curtailment rates" to the pipeline and direct market customers, pursuant to which priority 1 and 2 requirements could be curtailed while

Similarly without merit is the contention (82-1264 Pet. 16-23) that the Commission, by barring implementation of tariff sheets that do not comply with the curtailment rule (absent an adjustment from the rule), has improperly used its general rulemaking powers to extend indefinitely the five-month suspension period established by Section 4 of the Natural Gas Act. The Commission's decision withholding permission to implement nonconforming tariffs is tantamount to rejection of such tariffs until an adjustment can be obtained.[7] It is well within the Commission's authority to reject tariff filings that violate its regulations. See

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lower priority direct market requirements were being served. *Southern Natural Gas Co.* v. *FPC*, 543 F.2d 530, 532-533 (5th Cir. 1976); *United Gas Pipe Line Co.*, Op. No. 32, 5 F.E.R.C. (CCH) para. 61,093 (Oct. 31, 1978). Moreover, a pending settlement prescribing a permanent curtailment plan for United would have provided that the essential agricultural use priority would be implemented on a relief basis rather than automatically.

Faced with an inconsistency between the Commission's curtailment regulations and its existing and proposed curtailment plans, United filed an application for an adjustment from the regulations. On October 8, 1982, the Commission issued an order approving the settlement and establishing a permanent curtailment plan for the United system. Parties opposing the settlement had argued that the plan should be rejected for failure to comply with Section 401 of the NGPA. The Commission rejected these arguments, holding that the settlement did not violate Section 401, since the Commission had also granted United an adjustment from the requirements of the curtailment regulations. *United Gas Pipeline Co.*, Op. No. 150, 21 F.E.R.C. (CCH) para. 61,016 (Oct. 8, 1982).

In view of the Commission's approval of United's permanent curtailment plan under Section 401 and its determination that United was entitled to an adjustment from the requirements of the curtailment regulations, petitioners arguably are not aggrieved by the orders for which review is sought. See *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140 (1967).

[7]Where it is necessary, the Commission either has granted interim relief, as in United's case (see note 6, *supra*) or has acted expeditiously to grant such adjustments (see Pet. J.A. 116 n.3).

Municipal Light Boards v. *FPC*, 450 F.2d 1341, 1345 (D.C. Cir. 1971), cert. denied, 405 U.S. 989 (1972).

Finally, petitioners' argument (82-1272 Pet. 15) that a different rule *could* have been promulgated by the Commission is irrelevant. The standard of review applicable to informal agency action is the "arbitrary and capricious" standard of the Administrative Procedure Act, 5 U.S.C. 706(2)(A), which requires only that the Commission articulate a rational basis for its decision. See *Bowman Transportation Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 290 (1974). Under this standard, the reviewing courts are not free to substitute their judgment for that of the agency. See *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 416 (1971). In this case, the Commission's curtailment rule implementing Section 401(a) of the NGPA closely tracks the statutory language and clearly reflects rational decisionmaking.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1983

DOJ-1983-04

Nos. 82-1264 and 82-1272

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF LOUISIANA, *et al.*,

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,

Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE BROOKLYN UNION GAS COMPANY AND THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK IN OPPOSITION

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April 4, 1983

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Questions Presented

The questions presented by the petitions for a writ of certiorari are:

1. Whether the Court of Appeals for the District of Columbia Circuit's *en banc* approval of the Commission's attribution and allocation rules, which are required by the Natural Gas Policy Act, consistent with the Natural Gas Act, and provide exemptions where necessary, presents any important and novel question warranting review by this Court.

2. Whether the Commission's continuance of an existing attribution rule and adoption of an allocation rule mandated by the Natural Gas Policy Act, neither of which have been applied to United Gas Pipe Line Company and which may never be applied to that company under the Commission's exemption procedure, presents a ripe case or controversy warranting this Court's intervention.

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Nos. 82-1264 and 82-1272

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF LOUISIANA, *et al.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE BROOKLYN UNION GAS COMPANY AND THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK IN OPPOSITION

Respondents The Brooklyn Union Gas Company (Brooklyn Union) and the Public Service Commission of the State of New York (New York) file this brief in opposition to

the petitions for a writ of certiorari submitted on behalf of the State of Louisiana (Louisiana) (No. 82-1264) and United Gas Pipe Line Company (United) (No. 82-1272).[1]

Opinions Below

Brooklyn Union and New York adopt the description of the opinions below contained in United's petition at 10-11. The opinion of the court of appeals is reported as *Process Gas Consumers Group* v. *United States Dep't of Agriculture*, 694 F.2d 728 (D.C. Cir. 1981), and the opinion of the court of appeals on rehearing *en banc* is reported at 694 F.2d 778 (1982).

Jurisdiction

Brooklyn Union and New York adopt the statement of jurisdiction contained in United's petition at 2. By letter of February 28, 1983, the Clerk of the Court extended the time for filing responses to the petitions for a writ of certiorari to and including April 4, 1983.

Statutes Involved

Brooklyn Union and New York adopt the statement as to the statutes involved contained in United's petition at 2-3.

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[1] The statement of Brooklyn Union's affiliates required by Rule 28.1 of this Court is contained in the footnote to the Brooklyn Union and New York application of February 5, 1983 for an extension of time within which to file this brief and is incorporated herein by reference.

Statement of the Case

The petitions filed by Louisiana and United seek review of the opinion of the court of appeals panel, adopted and reaffirmed by the *en banc* court on rehearing, upholding the attribution and allocation rules issued by the Commission in accordance with Title IV of the Natural Gas Policy Act[2] (hereinafter NGPA) to protect high priority and essential agricultural users from curtailment of supply.

Since 1970, the Commission and its predecessor, the Federal Power Commission,[3] have overseen the development and implementation of curtailment plans for interstate pipelines to apportion natural gas among their customers during supply shortages.

The NGPA was enacted in 1978. Title IV of the NGPA prescribes natural gas curtailment policies for interstate pipelines, to assure that pipeline sales for essential agricultural uses will not be curtailed unless the available pipeline gas supply is required to serve certain enumerated high priority uses.[4]

The Commission is required by the NGPA to establish procedures expeditiously to ensure that the curtailment plans of interstate pipelines effectuate the congressional policy embodied in the NGPA. These procedures were es-

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[2] 15 U.S.C. §§3391, 3393.

[3] The Commission succeeded the Federal Power Commission in 1977 pursuant to the Department of Energy Organization Act, 42 U.S.C. §§7101 *et seq.*

[4] 15 U.S.C. §§3391-3394.

tablished by the Commission in its Order No. 29, as amended.[5]

Two of the procedures prescribed by the Commission were challenged by United and Louisiana before the court below. First, they attacked the mechanism adopted by the Commission for the *attribution* by pipelines of their customers' *requirements* among their customers' various suppliers. Second, they contested the mechanism for the *allocation* by pipelines of their *supplies* among the pipelines' customers in times of shortage.

Since many pipeline customers receive gas from more than one source, the mere approval of a curtailment priority system has no meaning in the absence of a mechanism to attribute the market requirements of such customers to their various suppliers for the purpose of curtailment. The court of appeals panel noted that the attribution rule adopted by the Commission[6] traces the actual dependence of end users:

> [Where a customer receives gas from more than one supplier] each pipeline is responsible for supplying a proportion of the customer's high-priority gas needs equal to the pipeline's percentage contribution to the customer's total needs during the base period.[7]

This rule merely preserves and continues the existing attribution mechanism utilized by virtually all interstate

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[5] Order Nos. 29 (J.A. 139-242), 29-A (J.A. 243-53), 29-B (J.A. 254-68), and 29-C (J.A. 269-327). References to items contained in the Joint Appendix filed with the Court by Petitioners are cited as "J.A."

[6] 18 C.F.R. §281.209.

[7] 694 F.2d at 743 (footnote omitted).

pipelines (including United) prior to enactment of the NGPA:

> The attribution formula as applied by distribution companies and interstate pipelines was intended to allow attribution in the same manner as was done in the underlying curtailment plans of interstate pipelines.[8]

In addition to this mechanism for attributing requirements, it was necessary for the Commission to adopt a gas allocation rule to carry out the NGPA's mandate that high-priority users (priority 1) and essential agricultural users (priority 2) be afforded maximum protection from curtailment.[9] To accomplish this, the Commission provided:

> All deliveries to all customers of the interstate pipeline for all volumes of natural gas not included in priority 1 and 2 shall be fully curtailed by the interstate pipeline before priority 1 and 2 entitlements are curtailed.[10]

The Commission expressly recognized that these attribution and allocation rules might not be the most appropriate approach for all affected pipelines, and provided that, upon a proper showing, it would approve deviations from one or both rules.[11]

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[8] Order No. 29-C (J.A. 297-98).

[9] Section 401(a) of the NGPA, 15 U.S.C. §3391(a).

[10] 18 C.F.R. §281.205(b).

[11] Order No. 29-C (J.A. 288-89, footnotes omitted). Adjustments are obtained pursuant to section 502(c) of the NGPA, 15 U.S.C. §3412(c) and 18 C.F.R. §1.41.

The attribution and allocation rules adopted by the Commission apply to thirty-eight interstate pipelines,[12] but only United and Louisiana sought review of these rules by the court of appeals. Although United and Louisiana couch their arguments in terms of the effect of these rules on all pipelines generally, the petitions to this Court concern application of the rules to *only* United's pipeline system.

On review, a unanimous panel of the court of appeals held that the portions of the Commission's orders at issue here fall within the Commission's regulatory powers and that the remaining "arguments are premature given the acknowledged availability of an adjustment procedure." 694 F.2d at 744. The court dismissed petitioners' argument that sections 4 and 5 of the Natural Gas Act (hereinafter NGA) left pipelines complete discretion to file tariff revisions without any regulatory restraint, holding that the applicable statutes and decisions of this Court[13] permitted the Commission "to announce constraints on tariff filings in the form of rules, though it must accept or reject rates on their individual merits." 694 F.2d at 746 (footnote omitted).

This part of the panel's decision ("Part I.C."), along with others, was vacated by the court of appeals in granting rehearing *en banc*. Following additional briefing and

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[12] Order No. 29 (J.A. 169); 18 C.F.R. §281.202.

[13] *Permian Basin Area Rate Cases*, 390 U.S. 747, 777-81, *reh'g denied*, 392 U.S. 917 (1968); *FPC* v. *Texaco, Inc.*, 377 U.S. 33, 39 (1964). Significantly, although United (pet. at 13) and Louisiana (pet. at 24) contend that Order No. 29 and the decision below necessarily conflict with the standards of NGA section 4(b), as interpreted in *North Carolina* v. *FERC*, 584 F.2d 1003 (D.C. Cir. 1978) and similar cases, the panel which heard and decided *North Carolina*, all of whom joined in the *en banc* decision in this case, perceived no such conflict.

oral argument on this issue, the *en banc* court adopted Part I.C. of the panel's opinion as its own opinion, endorsing "the panel's view that the Commission's specific grants of authority under sections 401, 402, 501 and 502 of the NGPA control over the general requirements of sections 4 and 5 of the Natural Gas Act. . . ." 694 F.2d at 783 n.3. The court stated that "[a]bsent a ripe case or controversy regarding the application of section 502(c)" it would refrain from passing upon "the scope of the Commission's authority in a section 502(c) proceeding." *Id.*

Reasons for Denying Writ

The petitions filed by United and Louisiana attempt to portray the rulings of the court below, affirming the Commission's gas curtailment attribution and allocation rules, as involving substantial questions of law and policy of significance to the administration of the Natural Gas and Natural Gas Policy Acts. In fact, the court of appeals' affirmance of the rules, in the absence of any showing of abuse of the adjustment procedure adopted by the Commission for treatment of atypical or unique situations, was fully consistent with the holdings of this Court in analogous situations. Moreover, far from presenting an issue of general significance to ongoing regulation of natural gas pipelines, the decision below is of conjectural concern at best to only one of the thirty-eight interstate pipelines affected by the rules, since that pipeline has already sought and received a timely adjustment under the very procedure it challenges as inadequate.

1. The prescription by the Commission of attribution and allocation rules for implementation of Title IV consti-

tuted only "the limited reopening of established plans to implement a discrete change" as mandated by the NGPA.[14]

It is far too late in the day to suggest that because section 4 of the NGA authorizes initiation of changes in pipeline tariffs by pipeline filings, and authorizes the pipeline to place the new tariff in effect at the end of the suspension period, the Commission may not adopt general standards which, if applied, would require rejection of the filing or some aspect thereof. As long ago as the Court's opinion in *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956), it was determined that a statutory "right" to a hearing on application did not preclude the Federal Communications Commission from proscribing any application for a license for a radio station in excess of a specified limit as long as there was available to the applicant an opportunity to seek waiver or amendment of the prohibitory rule.

This concept has been expressly applied by the Court to general rules of the Commission which would preclude inconsistent rate applications under section 4 of the NGA. *See Permian Basin Area Rate Cases*, 390 U.S. 747, 777-81 (1968) (section 4 not violated by a moratorium on rate increases above a fixed ceiling since relief is available through Commission's provision for special exemptions and motion for termination or modification of moratorium); *FPC* v. *Texaco, Inc.*, 377 U.S. 33, 39 (1964) (section 4 does

[14] Order No. 29-C (J.A. 289-90). The Commission's continuance of an existing attribution practice and adoption of an allocation rule mandated by the NGPA was not prescriptive of a detailed, comprehensive curtailment plan, as suggested by petitioners. Rather, these actions were necessary elements of the Commission's responsibility, under NGPA section 403 (b), to implement the limited reordering of curtailment priorities promulgated by the Secretary of Energy.

not preclude FPC from issuing regulations providing for summary rejection of contracts with pricing provisions other than those specified in the regulations as being permissible).[15]

The burden placed on a pipeline to justify departures from the prescribed attribution and allocation rules is, in substance, no greater or different than the burden already placed on pipelines by section 4 of the NGA to demonstrate the justness and reasonableness of their curtailment plan filings.[16]

2. The Commission recognized that the rules adopted in Order No. 29 might not be the most appropriate approach for all affected pipelines, and provided that any pipeline could seek an adjustment or propose a settlement utilizing a different mechanism:

> In applying Order No. 29, the Commission has not been inflexible. Where the rule was obviously unsuited to the system of a particular pipeline, it has not been applied. The Commission has also evinced flexibility in molding curtailment plans in the settlement context.

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[15] Although pipelines, as a general proposition, remain free to file tariffs of their own choosing pursuant to section 4 of the NGA, the NGA (sections 4(c) and 16) and NGPA Title IV make clear that this freedom does not remain totally unfettered. The essentially unlimited discretion advocated by petitioners here would effectively allow pipelines to unilaterally nullify NGPA Title IV for extended periods (for which the "refund" remedy provided by NGA section 4 would be meaningless).

[16] *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621, 645 (1972) ("In these [section 4] hearings, the pipeline has the burden of proving that its plan is reasonable and fair").

> If petitioners believe the rule unsuited to individual pipeline curtailment plans, the appropriate avenue for relief is a 502(c) adjustment or offer of settlement, not rehearing of the rule.[17]

It is possible that an adjustment may be required in the future for the United system.[18] But the Court teaches that a workable rule should not be discarded when the rule itself contemplates and can provide the relief which might be required.[19]

It cannot seriously be suggested that the Commission will not give adequate consideration to any properly supported request for an adjustment by United or Louisiana should they believe some variance from the attribution or allocation rules is required and can be supported. On the contrary, United requested and received a timely interim adjustment relieving it from compliance with the provisions of Order No. 29 pending Commission consideration of a curtailment settlement proposal (supported, *inter alia*, by United, Louisiana, Brooklyn Union and New York) which deviated in material respects from Order No. 29.[20]

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[17] Order No. 29-C (J.A. 288-89, footnotes omitted).

[18] Any situations where unique circumstances require special distinctions between United's "full" and "partial" requirements customers to protect high priority requirements can be accommodated under the rule's procedures.

[19] *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 755 (1972) *citing Permian Basin Area Rate Cases*, 390 U.S. 747, 784-86 (1968).

[20] *United Gas Pipe Line Co.*, Docket No. SA80-4, Order of the Director Office of Pipeline and Producer Regulation Granting Interim Relief and Petitions to Intervene and Staying Proceeding (Oct. 31, 1979).

The settlement proposal was subsequently approved by the Commission in an order which expressly granted United "an exemption from Order No. 29 requirements pursuant to Section 502(c) of the NGPA."[21]

As noted by the court of appeals, "petitioners have presented no evidence of any abuses in their [the attribution and allocation rules and the adjustment procedure] implementation."[22] The Commission assured the court below that "adjustments have been granted promptly."[23]

The attribution and allocation rules could affect United or Louisiana only if United sought to change its existing curtailment plan in a manner requiring an adjustment of the rules, and the Commission denied such an adjustment. This appears unlikely, for at least the foreseeable future.[24]

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[21] *United Gas Pipe Line Co.*, Docket Nos. RP71-29-000, *et al.*, Opinion No. 150 (Oct. 8, 1982), 21 FERC ¶61,016 at 61,087, *reh'g denied* Opinion No. 150-A (Nov. 29, 1982), 21 FERC ¶61,224, *petition for review pending sub nom. Mississippi Power & Light Co.* v. *FERC*, No. 82-4444 (5th Cir.).

[22] 694 F.2d at 746.

[23] 694 F.2d at 783 n.3.

[24] United's Vice President for Sales has advised the parties by letter of March 18, 1983 that, based upon its current estimates for the three-year period commencing November 1, 1983, "United does not anticipate that it will be required to curtail deliveries to its customers during the forecast period except possibly on severe peak days." United has proposed no change in its existing curtailment plan (or its current exemption from the provisions of Order No. 29) for this three-year period.

In short, the attribution and allocation rules articulated by the Commission expressly contemplate adjustments in appropriate circumstances, and nothing in the United and Louisiana petitions suggests any reason for believing that the Commission will refuse to grant any adjustment required to facilitate a just and reasonable curtailment plan for the United system.

If at some future time the Commission were arbitrarily or unlawfully to refuse to grant an adjustment sought by petitioners, they will have a full opportunity to seek redress at that time.[25]

[25] *Permian Basin Area Rate Cases*, 390 U.S. at 772.

CONCLUSION

For the foregoing reasons, the petitions for a writ of certiorari should be denied.

Respectfully submitted,

THE BROOKLYN UNION GAS COMPANY
and THE PUBLIC SERVICE COMMISSION
OF THE STATE OF NEW YORK

By: /s/ JOSEPH P. STEVENS

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